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THE

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Edited by JAMES C. ANDERSON, Esq.,

BARRISTER-AT-LAW

REPORTERS—

VICTORIA

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BENNET LANGTON, Esq.

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} BARRISTERS-AT-LAW.

TASMANIA

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AUSTRALIAN LAW TIMES

NOTES OF CASES FOR 1890-91.

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TASMANIA—H. B. MUGLISTON, *Barrister-at-Law*.

Vol. XIII.

NOTES OF CASES.
July 11, 1891.

1

PRACTICE COURT.

(Before Hodges, J.)

SHIRREFS v. JOHNSTON.

19th, 28th June.

Rules of Supreme Court 1884 Order LXIV r. 14—9 and 10 William III cap. 15—Supreme Court Act 1890 (No.) 1142 sec. 149—Arbitration—Award—Reference back to arbitrator. All applications to set aside an award, whether such award be within 9 and 10 William III. cap. 15 or not, must be made before the last day of the sittings next after such award has been made and published to the parties. An application, under sec. 149 of the Supreme Court Act 1890, to remit the matter to the arbitrator for reconsideration must be made within a reasonable time.

Motion on behalf of the defendant that the award, made by the arbitrator appointed under an order of Webb, J., made on the 26th February 1891, be referred back to the arbitrator for reconsideration and redetermination, and that the judgment entered by the plaintiff on the award be set aside.

The facts and arguments appear sufficiently from the judgment.

Mr. Hayes in support.

Mr. Bayles to oppose.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day said:—In this case an order was made by Webb J., on the 28th February, 1891, referring certain matters to arbitration. That order contained the following clause “unless restrained by an order of the Supreme Court or of any Judge thereof, the party in whose favor the award shall be made shall be at liberty, after fourteen days after service of a copy of the award on the solicitor of the other party to sign final judgment in accordance with the award, and for all costs that he may be

entitled to under this order and under the award together with the costs of the said judgment.” On the 23rd March the award under that order was made and published, the award was taken up by the defendant on the 3rd April. On the 23rd April in some correspondence which passed between the plaintiff and the defendant, the defendant intimated that he was likely to apply to the Full Court to have the award sent back to the arbitrator. On the 6th May the plaintiff by letter asked the defendant, whether, inasmuch as he had possession of the original award he would dispense with service of a copy of the award which was a preliminary step to signing judgment. The defendant intimated that he was going to apply to the Full Court and would not discuss the matter; the plaintiff thereupon on the 9th May served a copy of the award on the defendant which was a distinct intimation that he was going to act upon the award and that he was going to sign judgment. On the 26th May judgment was signed pursuant to the award. On the 2nd June the first step to have the award referred back was taken by notice of motion. On that motion being discussed before me the plaintiff contended that the application was made too late. The defendant contended that it was not too late to have the award set aside, and if it were not too late to have the award set aside and a *fortiori* it would not be too late to have it referred back. In support of this contention counsel for the defendant relied upon the Statute 9 and 10 William III. cap. 15 by which it is provided that awards which come within the purview of that Statute may be set aside on motion made in court before the last day of the term next after that in which the award was made and published, and counsel contended that notwithstanding the Judicature Act that Statute and the provision referred to are still in force. In support of that view the case of *College of Christ v. Martin*, 3 Q.B.D. 16 was cited. That case decides that terms still exist as a measure for determining the time

within which an award should be set aside under 9 and 10 William III. cap. 15, the defendant therefore relies upon the fact that terms still exist for the purpose of setting aside an award and *a fortiori* he contends he is able to have it referred back. The first answer to that is that that Statute does not relate to an award which is made on an order of a Judge in the course of the cause. The Statute, as I understand it, relates to submissions which are made rules of Court and to those applications to set aside the award which are made in the Court in which the submissions are made. This case is different, this is a case in which the order was made in the course of the cause and the distinction is pointed out in *Rogers v. Dullimore*, 6 Taunton 111 where it was held that the Court is not limited by time from setting aside an award founded on a submission by rule of Court in an action pending, where there has been a plain mistake of the arbitrator, although the application be not made in the term next after the making of the award. This is an action pending, I think therefore that that Statute does not apply to this case even if it be not affected by the Rules under the Judicature Act. This Court has decided in *Husbands v. Husbands*, 10 V.L.R. (L) 209 that that Statute is, so far as awards are concerned, and so far as it relates to fixing the time a dead letter and that the Rules under the Judicature Act have superseded the Statute and that Order LXIV. r. 14 is not *ultra vires*. By that rule it is provided that "an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties." The language of the rule and the case above referred to practically decide that all applications to set aside an award whether such award be within the Statute of William III. or not, must be made under Order LXIV r. 14. This application to remit the award was not made within the time limited by the rule and is therefore too late. Then it was contended that even if it were too late to have the award set aside, it is not too late to have the judgment set aside and the award referred back to the arbitrator. Counsel contended that under sec. 149 of the *Supreme Court Act* 1890 the Court or a Judge has power at any time to remit the matter to the arbitrator for reconsideration. In my opinion, although the Court has power to send back the award at any time the application for that purpose must be made within a reasonable time. I have therefore to decide whether under the circumstances this application has been made within a reasonable time. Treating the award as made and published on the 23rd March it was in the defendant's possession on the 3rd April and he did not move in the matter, except to write certain letters, until the 2nd June and he did not take any step until then notwithstanding the fact that the plaintiff had indicated in the most unmistakable way that he intended to act upon the award and to sign judgment. If we look at the Rules of the Supreme Court for determining what is a reasonable time and consider what time is allowed by them for giving notice in order to set aside the verdict of a jury, I think the time which the defendant allowed to elapse before he took action

is altogether unreasonable. The object of the Legislature was to have litigation made as speedy as possible. I must therefore refuse the application with costs on the ground that it was not made within a reasonable time.

Solicitors, for plaintiff *H. H. Budd*; for defendant, *Tuthill Geoghegan & Perry*.

SUPREME COURT SITTINGS.

Before a'Beckett, J.

STANLEY V. MOORE AND OTHERS.

—April 10th 14th & 15th.

The directors of a No-Liability company are not bound to defend an action brought against the Company for money honestly though irregularly borrowed and applied for the purposes of the company.

A single shareholder cannot as such, and without in any way referring to or binding other shareholders, institute an action to obtain his proportion of damages alleged to have resulted from a mere irregularity affecting him in common with all other shareholders.

Where a plaintiff sues in forma pauperis, costs incurred in the action prior to the order permitting him to sue in such form may be given against him.

The plaintiff in this action was a miner and a shareholder in the Ruby Queen Gold Mine near Kimberley Western Australia and the defendants Messrs Moore, Russell and Bullen were directors of the Ruby Queen Company. In the year 1889 the defendant directors borrowed the sum of £1416 15s. 11d. by way of overdraft from the defendants the English Scottish and Australian Chartered Bank for the purpose of constructing machinery on the mine and gave their joint and several personal guarantee for the amount. On the 13th of February 1890 the Bank at the request of the defendant directors, who gave their guarantee and an indemnity to the bank against all costs and expenses incurred by the bank in the suit, issued a writ against the Company for £1416 15s. 11d. (the amount of the money borrowed) and on the 26th of February the bank obtained judgment by default against the Company for the amount sued for with £5 13s. 10d. costs. At the end of March 1890 the defendant directors removed the registered office of the Company from Melbourne to Heidelberg (which latter place is in the mining district of Castlemaine) for the purpose of facilitating the winding-up of the Company and on the 18th of April 1890 the bank served a notice at the office in Heidelberg of its intention to wind-up the Company. Subsequently the bank presented to the Court of Mines at Castlemaine a petition for winding up the company and obtained an order *nisi*, which was made absolute, with the consent of the defendant directors, on the return thereof. On the 27th of May 1890 the defendant Meudell was elected liquidator at a meeting of creditors at Heidelberg, held under the direction of the defendant Bullen, and confirmation of his appoint-

ment was obtained on an application to the judge of the Court of Mines at Daylesford. The plaintiff's contention was that as the articles of the company gave no power to the directors to borrow as they had done and as no general meeting of the shareholders had been called which had authorised or sanctioned such borrowing, therefore such borrowing was *ultra vires*. For the same reason the plaintiff contended that the removal of the registered office of the company from Melbourne to Heidelberg was illegal. Upon the above mentioned facts and by reason of the defendant directors never having informed the plaintiff of their actions in the matter, the plaintiff charged the defendant directors with having conspired together to bring about the winding up of the company for the purpose of freeing themselves from another action that the plaintiff was bringing against them and also for the purpose of getting possession of the mine themselves and depriving the plaintiff of it. The plaintiff charged the bank with having notice, by reason of the articles of the company, that the borrowing was *ultra vires* and also charged the Bank with having acted merely as the agent of the defendant directors and the plaintiff further charged the defendant directors with breach of trust and malfeasance as directors; and the plaintiff claimed:—1. An injunction restraining the sale of the mine and other property of the company. 2. That the defendant directors be directed to discharge the judgment obtained by the Bank out of their own pockets. 3. That all the defendants be directed to take or concur in such steps as might be proper for withdrawing or rescinding the winding up order or in the alternative the plaintiff claimed £12000 damages. The defendant directors contended that the plaintiff was not entitled to maintain the action in that the Ruby Queen Company and the creditors had proved under the winding up order who had not been made parties to the action and that the matters in dispute could not be disposed of nor the rights of parties equitably adjusted without such company and creditors, and they further contended that notwithstanding the allegation by the plaintiff as to the illegality of the abovementioned borrowing and change of office, the said directors had full power to borrow money for the purposes mentioned and to render the company liable therefore. The other defendants also contended that even if the contention of the plaintiff as to the illegality of the borrowing and the change of office of the company were true such allegations were immaterial so far as such defendants were concerned and they further contended that the action was defective in that the Ruby Queen Company and the shareholders who had proved under the winding-up order had not been made parties. After the action was commenced but before the hearing the plaintiff obtained an order to sue in *forma pauperis*.

Dr. Smith and Mr. Farlow appeared for the plaintiff.

Mr. Topp and Mr. Isaacs appeared for the defendant directors.

Dr. Madden and Mr. Moule appeared for the

remaining defendants.

At the close of the opening of the pleadings counsel for the different defendants raised various objections to the form of the plaintiff's statement of claim and the plaintiff pressed by these objections applied to amend his pleadings. His Honor allowed the plaintiff to amend, and the plaintiff then amended his pleadings by striking out all his claim to relief except his claim for damages. The action against the liquidator was then dismissed, as by the amendment he had become an unnecessary party, and the case proceeded against the remaining defendants. At the close of the plaintiff's case counsel for the remaining defendants moved for judgment on the ground that the plaintiff had failed to establish his case or to show that he was entitled to any relief at all.

MR. JUSTICE A'BECKETT.—The action is a very peculiar one and though at present I do not quite see what relief the plaintiff is entitled to, I do not feel disposed at present to nonsuit the plaintiff.

The case for the defence was then proceeded with.

Cur. ad vult.

June 3.

MR. JUSTICE A'BECKETT:—The plaintiff, a shareholder in a no-liability company, brought an action against the directors of the company, the English Scottish and Australian Chartered Bank, and the liquidator of the company under a winding-up order which had been obtained by the bank. He sought to make the directors pay out of their own funds the debt on which the bank had recovered judgment against the company, and also a rescission of the winding-up order. Alternatively he claimed damages. The grounds on which this relief was sought were that the directors had conspired to bring about the winding-up of the company to free themselves from another action which the plaintiff had commenced against them, and to get possession of the mine for themselves, and that the bank, in the matter of its action and of the winding-up proceedings, had acted as the agent of the conspiring directors. The defences raised various objections to the form of action as to parties, which were urged after the pleadings had been opened and, yielding to these objections, the plaintiff then applied to amend, and was allowed to amend, by striking out all claim to relief except the claim for damages. I therefore dismissed the action against the liquidator of the company, who had become an unnecessary party, against whom no relief was sought. The case proceeded against the remaining defendants. It appeared that for the purpose of purchasing machinery for the mine in Western Australia, the directors borrowed money by an overdraft on the bank, for which they gave their personal guarantee. The money borrowed was spent in the purchase and transport of machinery. The directors were pressed for payment under their guarantee, and thereupon requested the bank to sue the company, which it did. They allowed judgment to go by default, and then requested the bank to wind up the company, with the object of selling the company's property in Western Australia to better advantage than if a sale were

attempted by execution upon the bank's judgment. The office of the company was then irregularly changed from Melbourne to Heidelberg to facilitate the winding-up proceedings under which an order was afterwards obtained and a liquidator appointed. The directors indemnified the bank against costs of the action and winding-up. All the persons concerned in these transactions were examined as witnesses for the defendants and I am satisfied that the charge of conspiracy for the purpose of acquiring the mine is groundless. The money was borrowed for the benefit of the company, and the directors by inducing the bank to proceed against the company and its property were acting for the purpose of relieving themselves as far as practicable from the liability which they had personally assumed for the company's benefit. The bank was willing to assist them by proceeding against the company as its principal debtor if indemnified against loss in doing so. The plaintiff's charge of fraud seems to have originated from threats to wind up the company, which I believe were made by Mr. Fitzgerald Moore in anger at the plaintiff threatening to proceed in respect of an alleged misapplication of the company's funds in Western Australia. In argument the plaintiff's right to redress was put as resting upon the irregularity of the defendants' conduct rather than upon the fraud charged.

It was urged that the money was illegally borrowed, and the office of the company illegally changed, that the directors should not have invited the bank to sue and wind up the company, and should not have left the action undefended, and therefore that the directors should pay damages to the plaintiff. For the defendant directors it was contended that no damage had been proved, as the company's undertaking had been abandoned before the bank sued, and further, that the action was wrong in form, the plaintiff suing alone, not on behalf of any other shareholders, and not showing whether he was in a minority or majority of shareholders, and that as the majority might approve of the proceedings of the directors, which were capable of confirmation, the plaintiff must fail in his action. As to this the case of *Hardy v. Wilson*, 8 V. L.R. (E.) 289, was relied upon. The bank, in contending that its debt was good against the company, though the borrowing was unauthorised by the resolution of an extraordinary meeting, relied on *Tyson's Reef Company*, 3 W.W. and A.B., (L) p. 162. That case was decided on the terms of an Act substantially the same as to the company's borrowing powers as that under which the present company was constituted. I think that the principle of the *Royal British Bank v. Turquand* (6, Ell. and Bl. 332), on which the *Tyson's Reef* case was decided, does not properly apply to cases where the company, as distinguished from the directors, have no power to borrow in the absence of statutory requirements which have not been fulfilled—a distinction explained in *Buckley on Companies*, fourth edition, p. 157. The *Tyson's Reef* case is, in my opinion, opposed to English decisions. It is, however, an authority binding upon this Court, and I cannot say that, in the face of it, the directors were wrong in

not defending the action brought by the bank for the recovery of money honestly, though irregularly, borrowed, and applied for the purposes of the company. On my view of the facts the plaintiff has been in no way defrauded, and has suffered no damage. I believe that however valuable the mine may have been, and may still be, the company in which he was a shareholder would not, and could not, work it, and that his interest as a shareholder was valueless. He had given a general assent to a proposal to borrow, though he had not bound himself to sanction the particular means adopted for borrowing and repaying. He sues in such a form that I could not properly award him damages if any had resulted from the irregularities complained of. A single shareholder cannot as such, and without in any way referring to or binding other shareholders, institute an action to obtain his proportion of damage alleged to have resulted from a mere irregularity affecting him in common with all other shareholders. I dismiss the action against all the remaining defendants. As the plaintiff is suing *in forma pauperis* I say nothing as to costs.

Dr. Madden I submit that the defendants for whom I appear are entitled to their costs against the plaintiff incurred previous to the time that the plaintiff obtained the order to sue *in forma pauperis*. *His Royal Highness Prince Albert v. Strange and others* 13 Jur. 507. *Annual Practice* 1889-90 at p. 333.

Mr. Topp.—If your Honor has power to make the plaintiff pay these costs, this I submit is the very case in which your Honor should exercise that power as charges of fraud have been brought against the defendants which are totally unsustainable.

Dr. Smith objected to any costs being allowed.

MR. JUSTICE A'BECKETT.—I am not aware that any costs have been incurred previous to the order to sue *in forma pauperis* but if any costs have been incurred previous to such order I think this is a case in which costs should be given against the plaintiff as he makes wholesale charges of fraud which are unsustainable. I shall therefore order that the plaintiff pay to all the defendants such costs as the defendants have sustained in the action prior to the order to sue *in forma pauperis*.

Solicitor for the plaintiff *Upton*; solicitors for the defendant directors *Braham & Pirani*; solicitors for the remaining defendants *Moule & Seddon*.

(Before Webb, J.)

HADDOW AND ANOTHER V. DUKE COMPANY, NO LIABILITY.

May 22nd. 26th

Mining Companies Act 1871 s.s. 52 and 56.

Where a call upon shares in a no liability company has been made and remains unpaid for a period of 14 days from the making thereof such shares become forfeited.

When a director of a no liability company loses his qualification as such director by the forfeiture of his

shares in the company his subsequent redemption of them does not reinstate him as a director.

Where the articles of a company do not contain a provision validating the acts of de facto directors as opposed to de jure directors, all acts done by unqualified directors are invalid.

The Statement of Claim set out that the plaintiffs were merchants carrying on business in Melbourne and that the defendant was a mining company registered as a no-Liability Company carrying on business within the mining district of Maryborough. That on or about the 4th of July, 1889, the plaintiffs purchased 150 shares in the defendant company and that on or about the 23rd. of January 1890 the plaintiffs purchased 250 additional shares in the said company; that at the time of the purchase of the first lot of 150 shares all calls were paid thereon and the plaintiffs continued to pay all calls on such shares up to and inclusive of the 59th call which was made on the 8th of January, 1890, and at the time of the purchase of the second lot of 250 shares all calls were paid thereon, and the plaintiffs continued to pay all calls on such shares up to and inclusive of the 58th call which was made on the 11th of December, 1889. That by the rules of the company the directors were required to be shareholders in the company at the time of their election, and the directors who made the 59th and all subsequent calls up to the 22nd of March, 1890, were incompetent to be elected or to act as directors, not having been shareholders at the time of their election or when so acting. Notwithstanding such incapacity of such directors the said company on the 22nd of March, 1890, wrongfully put up for sale, as upon a forfeiture, the shares of the plaintiffs and there being no bid therefor bought them in and has since disposed of the same to other persons who are registered as shareholders in respect of such shares to the exclusion of the plaintiffs. Since the exclusion of the plaintiffs the defendant company has formed various companies to work portions of land held by them, in each of which the plaintiffs would have had a right had they not been so wrongfully excluded. The plaintiffs claimed:—That the defendant company may be ordered to appropriate or purchase and register in the name of the plaintiffs 400 shares in the defendant company as also a proportionate number of shares in all companies formed by the defendant company to work any portion of the land held by such company at the time of the alleged forfeiture and deliver to the plaintiffs scrip for the same or in the alternative the plaintiffs claim that the defendant company pay to the plaintiffs the sum of £2000 as damages.

By their defence the defendant company admitted that it sold the shares referred to in the statement of claim as forfeited and that the persons purchasing the same are now registered as shareholders in respect thereof; it also admitted that by the rules of the company the persons from time to time to be appointed directors were required to be shareholders in the company at the time of their election; with respect to all other allegations contained in the statement of claim they were either not admitted or denied.

In reply the plaintiffs joined issue. The remaining facts appear in the judgment.

Mr. Helm and Mr. Weigall for the plaintiff. To create a forfeiture there must be a good cause for forfeiture. The call must be properly due and must be made by properly qualified directors. In each of the cases of the 59th 60th and 61st call, the call was made by directors not properly qualified in that at the time the call was made the directors making the calls were not the holders of 100 shares in the company in accordance with the articles of the company and there is no provision in the articles of the company validating the acts of *de facto* directors.

Mr. Topp and Mr. Barrett (Mr. Purves Q.C. with them) for the defendant company.

Rule 5 of the articles of the company provides that the company shall be managed by a board of directors who shall be the holders and continue to be holders of 100 shares in the company but rule 15 provides for the first election of directors who when once in office shall remain in office until the next general meeting. The Act says that after a call has been due for 14 days and remains unpaid the shares shall be forfeited but I shall submit that the shares may be redeemed at any time up to sale by payment of the calls due and in every case here the directors have redeemed their shares before sale. I submit that once the directors are in office they remain in office until the next general meeting, for if this were not so the company might be left entirely without directors which is a position that cannot be contemplated for a second. Rule 5 might be interpreted by allowing the shareholders to turn off a director who ceases to be qualified but it should not be read to mean that a director ceases to be a director *ipso facto* upon the forfeiture of his shares. Admitting that all calls up to and inclusive of the 59th call were bad the 60th call was good it was made immediately after the election of the directors in January and there is no evidence to show that any of them were disqualified at the time of making this call. On the question of damages, the measure of damages is the value of the shares at the time of the conversion not their value at the time of action brought, *Benjamin v. Wymond* 10 V.L.R. (E.) 3.

Mr. Helm in reply. An overdue call causes absolute forfeiture, *King's Birthday Co. v. Jack*, 11 V.L.R. 197. As soon as the call was overdue and unpaid the directors offices became vacated and nothing but a resolution by a general meeting of the shareholders could reinstate them in office. Once a director has lost his qualification he does not regain it by redeeming his shares; it is necessary that he should be re-elected. On the question of damages I would refer the court to *Amoretty v. City of Melbourne Bank*, 13 V.L.R. 431, and *Peek v. Derry*, 37 Ch. D. at p. 594, which though reversed on appeal was not touched on the question of damages.

Cur ad vult.
June

MR. JUSTICE WEBB. Action to recover from defendant Company 400 shares in it, alleged by it to

have been forfeited for non-payment of calls; or in the alternative damages for their conversion. The plaintiffs were the holders of the shares in question which were alleged by the Company to have become forfeited for non-payment as to 250 shares of the 59th and 60th calls and as to 150 shares of the 60th and 61st calls. The sole objection raised by the plaintiffs to the forfeiture is that the Directors by whom the 59th, 60th and 61st calls were made were not at the time of making the calls qualified to act as Directors. The Directors present at the meeting on the 27th December, 1889, at which the 59th call was made were Messrs. Du Bourg, Morgan and Bucknall, constituting a bare quorum. As to Du Bourg it appears that at a Directors' meeting held on the 23rd April, 1889, he was appointed as a Director to fill a casual vacancy pursuant to a power in that behalf in the Articles of Association. He was then registered as the holder of 100 shares in the Company on which all the calls then due had been paid. On the 19th July, 1889, at a shareholders' meeting the retiring Directors, of whom Du Bourg was one, were re-elected and under this re-election, if at all, Du Bourg held office on the 28th December, when the 59th call was made. But in the interval between his first appointment and his re-election, on the 8th May 1889 the 51st call fell due and on the 12th June the 52nd call. These were respectively paid by Du Bourg on the 6th June and the 2nd July and it is contended for the plaintiffs that more than 14 days from the due date of these calls having expired before payment, the shares had become absolutely forfeited and he had ceased to be, and at the time of his re-election on the 10th July 1889 was not the holder of 100 shares in the company. Morgan was also re-elected as a director on the 19th July 1889. He was then duly qualified being the holder of 100 shares. On 24th July 1889 the time for payment of the 53rd call expired and on the 28th August the time for payment of the 54th call. Morgan did not pay these calls until the 4th September when he paid both. It is contended for the plaintiff in his case that on the expiration of 14 days from the due date of these calls his shares became absolutely forfeited and he thereupon became disqualified to act as a director and was so disqualified on 27th December 1889 when the 59th call was made. Bucknall, was at a Directors' meeting on 6th May 1889, appointed to fill a casual vacancy until the next general meeting and at the shareholders meeting on the 19th July 1889 he was re-elected as a Director. But in the interval the 51st call became payable on the 8th May and the 52nd call on the 12th June. Bucknall paid these calls on 23rd May and 5th July in each case more than 14 days after their due date. The 53rd call was due on the 10th July and the 14 days expired on the 24th July after his re-election. Bucknall did not pay this call until 2nd August. He therefore is obnoxious both to the objection to Du Bourg and to that to Morgan. The 60th call was made at a Directors' meeting on 31st January 1890 which meeting I find as a fact was held after the shareholders' meeting on the same day at

which new directors were appointed. The directors present at the making of the call were Barton, Du Bourg, Morgan, and Bucknall. The objection to the call was mainly based upon the contention that the call was made before the general meeting of shareholders at which Barton, Bucknall and Du Bourg were re-elected and that it therefore stood in the same position as the 59th call. It was also contended that their shares having been forfeited they were incapable of re-election. The 61st call was made at a directors' meeting on 28th February 1890, at which Barton, Bucknall, and Morgan, were present. As to Barton and Bucknall, it is open to the same objections as those made to the 60th call. As to Morgan it is open to the objection made to him as to the 59th call. As to all these calls the objections resolve themselves into the question whether shares in a No Liability Company become absolutely forfeited on the expiration, without payment of the call, of 14 days from the day on which the call is made payable; and whether if so the subsequent redemption of the shares under section 56 of the *Mining Companies Act* 1871, vests the shares *ab initio* so as to avoid the forfeiture or merely creates a new right in the shares from the time of reinstatement. The question whether an absolute forfeiture accrues on the expiration of the 14 days without payment of the call has been determined by the Full Court in *King's Birthday Co. v. Jack*, 11 V.L.R. 197, overruling *Guttridge v. Gippsland M. Co.* 5 A.J.R. 161 and *Reg. v. McGregor ex parte Wilkinson*, 6 V.L.R. 167. In that case the present learned Chief Justice in delivering the judgment of the Court says, speaking of sec. 52 of *The Mining Companies Act* 1871 "The words 'absolutely forfeited' are to be taken we think in their literal sense. The share is gone from the owner who ceases to be a shareholder at the expiration of the time limited for payment of the call." The question is therefore not now open for consideration by me, and I must hold that upon the expiration of the 14 days without payment these various gentlemen ceased to be shareholders in the company. Then did the subsequent payment of the calls avoid the forfeitures and reinstate these gentlemen as directors. Taking first the case of Du Bourg on the 22nd May, 1889, 14 days from the day on which the 51st call became payable elapsed, and he not having paid that call his shares became forfeited and he ceased to be a shareholder. On 6th June he paid the call and the payment was accepted by the company. There is no evidence that his shares had been advertised for sale or any time of sale fixed and when he paid the call he was clearly entitled to redeem his shares under section 56 of the Act, and thereupon he again became a shareholder in the company. Then on the 26th June his shares again became forfeited for non-payment of the 52nd call. He paid this call on the 2nd July and there being no evidence that a day of sale had been fixed and was then passed he thereby again became a shareholder and was such when elected a director on 19th July. Then on the 28th August his shares again became forfeited for non-payment of the 54th call and he ceased to be a

shareholder. On the 13th or 14th September he paid that call. It has been argued for the plaintiff that inasmuch as the 7th September had been advertised as the day on which it was intended to sell his shares and that day had passed before he paid the call the 56th section giving a right of redemption "at any time up to or on the day previous to that upon which it is intended to sell the share" did not apply and he could not legally redeem his shares on the 14th. It is unnecessary for me to deal with this question as I am of opinion that even if he did legally redeem his shares that did not reinstate him as a director.

Morgan and Bucknall stand in the same position as Du Bourg. They were both elected on the 19th July 1889, and their shares subsequently became by virtue of the Act forfeited for non-payment in due time of the 53rd call. They subsequently and before the making of the 59th call paid this call and redeemed their shares.

It has been argued for the defendant company that even if a director's shares become forfeited by the operation of the Act he does not thereby cease to be a duly qualified director if he was qualified at the time of his appointment, and it is pointed out that the Articles of Association of the defendant company do not contain a provision similar to that in article 8 of the 7th Schedule to the Act viz.—That the office of a director shall be vacated if he cease to be a shareholder. But this is met by the words of the 5th Article "The company shall be under the management of a Board of Directors consisting of five shareholders each of whom shall hold and continue to be the holder and registered in the books of the company for at least 100 shares." Here the insertion of the words "and continue to be the holder" which are not in Article 1 of the 7th Schedule to the Act appears to me to render it unnecessary to enter in the Articles that a Director's office shall be vacated if he cease to be a shareholder. In my opinion when Du Bourg Morgan and Bucknall ceased to be shareholders they ceased also to be Directors *de jure*, and although upon the subsequent redemption of their shares they again became shareholders, nothing short of their re-election as Directors could validly put them in that position again. Then it is said that these gentlemen continued to be Directors *de facto* and that as such they were competent to join in making a call. But this is in direct opposition to several cases decided in this Court and to the ultimate decision of the Privy Council in *Garden Gully Co. v. McLister*, 1 App. Cas. 39, affirming the judgment of the late Mr. Justice Molesworth. A clause which is found in the Articles of Association of many companies validating the Acts of *de facto* Directors, such as Article 19 of the 7th Schedule to this Act, is not contained in the Articles of this Company. I therefore hold that the 59th call was badly made and no forfeiture could follow from its non-payment. I may observe in passing that in arriving at this conclusion I treat the 51st, 52nd, 53rd and 54th calls as well made, no evidence having been given to impeach their validity. The 60th call was made on the 31st

January, 1890, at a meeting of Directors at which Du Bourg, Morgan, Bucknall and Barton were present. Earlier on the same day at a General Meeting of the Company Du Bourg, Bucknall and Barton had been re-elected as Directors, and so far as appears on the evidence there was then no valid call overdue and unpaid by any of them. Du Bourg and Barton had not then paid the 59th call the time for payment of which expired on the 22nd January, but as I hold that call to be invalid their non-payment of it did not work a forfeiture of their shares. They were therefore duly qualified and duly elected and were competent to make the 60th call. Morgan was elected a Director on the 19th July 1889. His shares became forfeited on the 24th July, for non-payment of the 53rd call. He therefore ceased to be a Director *de jure* and although he afterwards redeemed his shares there is no evidence of his subsequent appointment as a Director. He was therefore not competent to act as a Director when the 60th call was made. But as a quorum of those present, were competent, this is immaterial, and I hold the 60th call to have been well made. The 61st call was made on the 28th February, 1890, at a meeting of Directors at which Du Bourg, Morgan, Bucknall and Barton were present. But before this Du Bourg's, Morgan's and Bucknall's shares had become forfeited for non-payment of the 60th call, the time for payment of which expired on the 26th February. The 61st call was therefore badly made and no forfeiture could accrue for non-payment of it. The plaintiff's shares were forfeited and sold for non-payment of the 59th, 60th and 61st calls and as I hold the 60th call to have been well made the shares were rightly forfeited and sold. The plaintiffs therefore fail, and judgment will be entered for the defendant company with costs.

Solicitors for the plaintiffs, *Hobday*; solicitors for the defendants, *Morgan & Gill*, for *Barrett*.

IN BANCO.

(Before Higinbotham C.J., Webb, & a'Beckett, J.J.)

STEELE V. MAYOR, ETC., OF ESSENDON.

29, 30 June.

Local Government Act 1890 s. 405—Corporation—Fence—Negligence.

A municipality is bound to keep in repair any artificial work of its own creation.

Reference to Full Court by HOOD, J.

The action had been instituted by Joseph Bowen Steele against the Mayor, etc., of Essendon, to recover damages in respect of injuries sustained by him by reason of the defendants' negligence. The facts were as follows:—The plaintiff had met with an accident through falling into a deep unguarded hole in a road situate within the municipal district of the defendants. This hole was formed by the elbow of a creek which adjoined the road. A fence had been erected around

the hole, 9 or 10 years ago, but a part of the fence had fallen into the hole through the wearing away of the banks. There was evidence that the fence had been originally erected and subsequently, on two or three occasions, repaired by persons employed by the defendants. The action was tried before a judge and jury on the 8th October, 1890; on the conclusion of the evidence the following questions were submitted to the jury. (1.) Did the defendants undertake the making and forming the road? (2.) Were the defendants guilty of negligence in not repairing the fence? Could the plaintiff by the exercise of reasonable care and caution have prevented or avoided the accident? The jury answered questions (1) and (2) in the affirmative and question (3) in the negative; they assessed the damages at £1057 12s. 0d. A reference was then made by Hood, J., who tried the case to the Full Court, as to whether there was any evidence proper to be submitted to the jury, and whether, notwithstanding the findings of the jury the defendants were entitled to judgment or whether the plaintiff should have been non suited.

Mr. Leon and Mr. Cussen for the plaintiff. The road had been formed at the *locus* of the accident and, as the fence must be regarded as part of the formation of the road, the defendants were guilty of negligence and are therefore liable, *Hitchins v. Mayor, etc., of Port Melbourne*, 14 V.L.R., 748, and 15 V.L.R. 761; *Scott v. Mayor, etc., of Collingwood*, 7 V.L.R. 280. Moreover, apart from this argument, the fence was the creation of the defendants and they were bound to see that no injury was sustained thereby. *Borough of Bathurst v. Macpherson*, 4 App. Cas. 265; *Dodds v. Berwick*, 11 V.L.R. 743.

Dr. Madden and Mr. Mitchell for the defendants—The fence is, in no way, part of the formation of the road, and the defendants are not liable for omission to repair it. The liability of the municipal bodies should not be extended. *Grieve v. Mayor etc. of Melbourne* 1 W.W. and A.B. 95; *Royle v. President etc. of Avon*, 1 A.J.R. 166; *President etc. of Barrabool v. Torr*, 2 V.R. (L.) 65; *Reid v. Mayor etc. of Fitzroy* 4 A.J.R. 109; *Phillips v. Mayor etc. of Melbourne*, 1 V.L.R. (L) 74; *Dodds v. Berwick*, 11 V.L.R. 743; *Baseley v. St. Arnaud* (unreported) were cited and commented on.

HIGINBOTHAM, C.J.—The jury found, in answer to questions put to them, first, that the defendants had undertaken the making and forming the road on which the accident occurred; secondly, that the defendants were guilty of negligence in not repairing the fence; and thirdly, that the plaintiff could not, by the exercise of reasonable care and caution, have prevented or avoided the accident. The learned judge reserved two questions for the opinion of the Full Court—first, whether there was any evidence proper to be submitted to the jury; and second, whether, notwithstanding the findings of the jury, the defendants are entitled to judgment, or the plaintiff should have been nonsuited. The plaintiff met with an accident through falling into a deep, unguarded hole in the road formed by an elbow to a creek. A fence was put up round

this hole 9 or 10 years ago, but a part of it had fallen into the hole through the wearing away of the banks. There was evidence that this fence was originally erected and was subsequently repaired on two or three occasions for the defendants by persons employed by the defendants, and the jury were at liberty to conclude, on a conflict of evidence as to the place at which the defendants' council authorised the fence to be erected, that the council by resolution dated May 26, 1879, expressly authorised this fence to be erected at the place where the accident subsequently occurred. We are of opinion that there was evidence proper to be submitted to the jury in support of the plaintiff's case. Upon the second question, it has been argued for the defendants that, admitting that all the evidence with respect to the fence would justify a conclusion favourable to the plaintiff, a cause of action has not been established, because it has not been proved that the formation or making of the road in question had been undertaken by the council at the particular part of this road where the fence had stood, and the cases of *Dodds v. Shire of Berwick* (11 V.L.R., 743), and *Baseley v. Shire of St. Arnaud* (not reported), have been cited as showing that a municipal body is not liable as for negligence for a foundrous condition of a road unless the particular part of the road through the bad condition of which the accident occurred had been taken over and formed by the council. In the first-mentioned case it was stated in the judgment, at page 746, that "The duty of maintenance or repair is co-extensive with, but it does not extend beyond, the works of construction or formation already done, and which necessarily require from time to time to be maintained or prepared." We agree with the view here expressed, and if the council had never placed the fence round this hole, the plaintiff, in our opinion, could not on the evidence given in this case support an action against the corporation. It was a matter in the discretion of the council to erect or not to erect the fence; but having erected it on a road open to the public under the care and management of the council, obviously for the purpose of providing for the safety of the passengers, the council was bound, in our opinion, to keep it in reasonable repair. The erection of the fence constituted a taking over of that part of the road on which the fence stood, and was, in fact, an act connected with the making of that part of the road. The case, therefore, in our opinion, comes within the principle of *Dodds v. Shire of Berwick*, (11 V. L.R., 743); but the duty of the council to maintain this fence rests on another and a distinct ground. The fence was the property of the council, the erection of it on a road under the care of the council was a lawful act, and it was the duty of the council to maintain in proper state of repair the artificial work which it had created, on the principle on which it was held to be the duty of the municipal council in the case of the *Borough of Bathurst v. M'Pherson* (4 App. Cas., 265) to maintain the barrel drain. See also *Kent v. Worthing Local Board* (10 Q.B.D., 118). We conceive that we are not departing in any degree from the authorities on this subject which have been cited in argument in

holding that the defendants in this case are not entitled to judgment, and that the plaintiff should not have been nonsuited. Our answer to the first question will be in the affirmative, and to the second question in the negative. Liberty has been reserved by consent to the Full Court to enter judgment, and we accordingly order judgment to be entered for the plaintiff for £1,057 12s., with costs of the action and of this reference.

Solicitors: for plaintiff, *Gaunson & Wallace*; for defendants, *Gillott & Co.*

(Before Higinbotham, C.J., Hodges and Hood, J.J.)

FOSTER v. O'CALLAGHAN.

—27, 29, April. 28 June

Licensing Act 1885 ss. 56, 58—Licensed premises—Sanitary improvements—Service of copy of order on owner.

In proceedings under s. 58, proof of service of the copy of the inspector's order on the owner is not a condition precedent to the right of the licensee to recover the expenses, incurred by him, under s. 56, from the owner.

Order to review an order of the justices at Stawell dismissing a complaint.

[The facts appear in the judgments].

Mr. Irvine appeared to move the order absolute.

Mr. Fink appeared to show cause.

Cur. adv. vult.

HIGINBOTHAM, C.J.—Order to review. The complainant, a licensed victualler, sued the defendant, the owner of the Railway Hotel, Stawell, under section 58 of the *Licensing Act 1885* for £15 10s., money expended by the complainant in making repairs and improving the sanitary condition of his licensed premises in compliance with an order served on him by the inspector of the licensing district, under section 56 of the *Licensing Act 1885*. The execution of the work and the amount expended by the complainant were not disputed, but the justices dismissed the complaint on the ground that no proof had been given that the defendant had been served with a copy of the order of the inspector as provided by section 56. If such proof were necessary, there was evidence, in our opinion, from which the justices might have concluded either that the defendant had been in fact served with the copy order, or that he had so acted as that he was estopped as between himself and the complainant from denying such service. But we are of opinion that in proceedings under Section 58 proof of service of the copy on the owner is not a condition of the right of the licensee to recover. The duty of informing the owner of the order is not cast by the law upon the licensee. It is the duty of the inspector at the time he serves the order upon the licensee to serve a duplicate of the order, addressed to the owner, upon the owner; or, if he cannot be found, to post it upon the front, or the principal doors, of the premises. And the owner as well as the licensee is allowed to appeal from the order within seven days from the service, and if the licensee neglect to comply with the order the

owner may, after a reasonable time, and before the expiration of six months from the date of service, enter upon the premises and make the repairs required. But the negligence of the inspector to serve the owner, as he is required by law to do, cannot be charged against the licensee, nor can the licensee be deprived by such negligence of his right to recover the expenses he has incurred in fulfilling the duty cast upon him. The law looks to the licensee who holds the license in respect of the premises, and is solely responsible for keeping the licensed premises in a proper state of repair. The order is made and served primarily upon him, and if the required repairs are not made before the expiration of a reasonable period, it is the licensee who is summoned to show cause why the license should not be cancelled. If the licensee obeys the order served upon him by the inspector, and if he is not under covenant or agreement with the owner to do any or all of the matters which the inspector is authorised to require him to do, he may sue the owner; and if the justices are satisfied that the work done has been such as the inspector is authorised to require, the licensee may recover the amount expended by him although the owner, through the negligence of the inspector, or other cause, has not been served with the duplicate order. The order to review will be made absolute with costs, the order dismissing the complaint will be reversed with £3 8s. 6d. costs to the complainant, and the case will be remitted to the justices for rehearing.

HODGES J.—Complaint under section 58 of the *Licensing Act 1885*, by the occupier of licensed premises against the owner of these premises for certain money expended by him on the premises. The justices dismissed the complaint on the ground that no proof had been given that the owner had been served with a copy of the order of the inspector, as provided by section 56. In my opinion the complainant was entitled to succeed without proving service of any such order. To entitle an occupier to succeed under section 58 he has to prove to the satisfaction of the justices (1) that money has been expended on the licensed premises; (2) that such money was expended in respect of matters which the inspector is, under the *Licensing Act 1885*, authorised to require the occupier to do; (3) that he is not under covenant with the owner to do such matters. When these three propositions are established to the satisfaction of the justices the complainant is, in my opinion, entitled to succeed. And to say that the complainant cannot succeed without proving that the owner has been served with the copy-order is to put words into section 58 which are not there. Further, I can see no hardship in requiring the owner to make good to the occupier money expended by him in keeping the premises in the condition in which the law says that they should be kept, when, as between the owner and the occupier, there is no covenant that the occupier is to bear such expense.

HOOD J.—I concur in the judgment of the Court.

Solicitors: for complainant *Smart & Walker*; for defendant *Gaunson & Wallace*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., Webb and Hood J.J.)

NYULASY V. ROWAN.

10, 11, 12, 23, June.

Contract—Consideration—Continuing offer.

If a man makes an offer, either to buy or to sell, and promises to keep that offer open for a given time, and there is no consideration, he is not bound, and may withdraw his offer at any time before it has been accepted, because till then, there has been no agreement between the parties; but, if, after the offer is made, while it is open and unrevoked, the other party duly accepts, then there is an agreement and both are bound.

Appeal from Molesworth J. (See 12 A.L.T. p. 193.)

Dr. Madden and Mr. Mitchell, for the appellants, repeated their previous arguments and referred to *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266; *Dickinson v. Dodds*, 2 Ch. D. 463; *Crofts v. Beale*, 11 C. B. 172; *Oldershaw v. King*, 2 H. & N. 399; *Cooke v. Oxley*, 3 T. R. 653.

Mr. Irvine (with him *Mr. Purves, Q.C.*) for the respondents, cited, in addition, *Alliance Bank v. Broom*, 2 Dr. & Sm. 289; *Crears v. Hunter*, 19 Q.B.D., 341; *Great Northern Railway v. Witham*, L.R. 9 C. P. 16; *Pollock on Contracts* (5th Ed, p. 25; *Cooke v. Oxley*, 3 T. R. 653.

HIGINBOTHAM, C.J.,—This is an appeal from a judgment of Molesworth, J. The statement of claim contains three alternative causes of action. The first of these for shares bargained and sold was abandoned at the hearing. The second was founded on a verbal agreement alleged to have been made by and between the plaintiff and the defendant on July 21, 1890, by which it was agreed, in consideration that the plaintiff would not proceed at that time to sell 400 shares, which he held in the Melbourne Tramway and Omnibus Company, at the then market price, and would not place the shares at that time on the market for sale at that price, that the defendant should, on being requested by the plaintiff so to do, at any time within three months from July 21, 1890, purchase from the plaintiff his said 400 shares at the price of £8 each. The plaintiff alleged performance of this agreement on his part, a request made by him to the defendant to purchase the shares on or about August 21st., 1890, and a refusal by the defendant to purchase. The learned primary Judge held that this agreement was made between the parties on July 21, and that it was broken by the defendant; and he gave judgment for the plaintiff on this claim. The third alternative cause of action was founded upon a verbal offer alleged to have been made by the defendant to the plaintiff on or about July 21 to purchase the plaintiff's 400 shares at the price of £8 per share, such offer to remain open three months, from that date acceptance of the offer by the plaintiff on or about August 21st within the three months,

and while the defendants offer was still open and unrevoked, and refusal by the defendant to accept the shares. The learned judge found that the defendant had established by proof this claim as well as the second, and he gave judgment on it for the plaintiff. The defendant now appeals against this judgment on both grounds. With regard to the second ground of claim it has been contended that there was no agreement between the parties on July 21 as there was no consideration for the promise which it was admitted the defendant gave on that day. The plaintiff's answer to this argument is, that there is evidence of a request then made by the defendant that the plaintiff should not immediately sell his shares, or place them on the market, and that such request if complied with by the plaintiff was a good consideration for the defendant's promise. *Crears v. Hunter*, (19 Q.B.D. 341). The question, then that is raised upon this part of the case is whether there was any evidence, upon which the judge might reasonably act, that the defendant did at that time really, and not by way of banter only, request the plaintiff not to sell his shares, or place them on the market. We are of opinion that there was such evidence. The defendant's answer to the whole claim of the plaintiff was that, having been asked by a friend of the plaintiff, who was anxious and distressed by the falling state of the market, to comfort the plaintiff he spoke to the plaintiff jocularly only, intending to comfort him, and that he gave him an unreal and false promise without intending to perform it. The defendant, however, admits that the plaintiff did not seem to take his words of comfort as a joke. Now the judge has found upon evidence amply sufficient that this defence is untrue, that the defendant spoke to the plaintiff not in joke but in earnest, and influenced by a desire to protect the stock of which he was a large holder himself. Then as regards a request, the plaintiff swore that the defendant said to him on July 21, "don't be foolish to sell now and lose money." The defendant, in answer to an interrogatory, stated that he did not, to the best of his knowledge information or belief, say to the plaintiff, "your trams are all right, don't be so foolish as to sell them at a loss," but he admits that he may have used words to that effect. Now assuming, as we are bound to do, that the defendant spoke at this conversation seriously, and that he was using the opportunity then presented to him to make in his own interest and for his own advantage a *bona fide* offer to the plaintiff who accepted his words seriously, what is the meaning that should be given to these words, or words to the like effect then uttered by the defendant. The Judge has found that forbearance by the plaintiff to sell his shares was on account of an implied, though perhaps not an express request by the defendant. I should be inclined to say that these words might be taken to convey an express request by the plaintiff not to sell. We are of opinion that they are evidence, either express or by implication, of such a request; That the judge was justified in concluding that a request was made by the defendant, and that

it was in consequence of such request that the plaintiff forbore to sell his shares. The judgment therefore cannot be disturbed on this ground. With respect to the third alternative ground of action it has been contended for the defendant that there must be consideration for a continuing offer of this kind, that the plaintiff did not accept the offer at the time it was made, and that when he did accept it the defendant had changed his mind; so that treating the transaction of July 21 as an offer only and not as a contract, the parties never were *ad idem* and no contract was entered into between them subsequently to July 21. In support of this view, *Cooke v. Oxley*, (3 T. R. 653) was relied on. The effect and the authority of that case have been the subject of some controversy which is still unsettled. See Benjamin on Sales (4th Ed. p. 69); Pollock on principles of Contract (5 Ed. p. 24, note); *Cooke v. Oxley* (3 T. R. 653), which was decided on a motion in arrest of judgment, may be supported on the ground that the declaration did not aver that the defendant actually left the offer open until the hour named, but only that he promised to do so. But if *Cooke v. Oxley*, is to be supported on this ground of pleading, it would not govern the present case where it is alleged in the statement of claim, and proved in evidence, that the plaintiff by letters accepted the offer while it was still open and unretracted. Unless, therefore, there is some distinction to be drawn between an offer by letter or telegram and an offer by word of mouth, and we are not aware of any reason or authority for such a distinction, see per Lush, J., in *Stevenson v. McLean*, (5 Q.B.D. 351) the present case comes within the artificial but convenient explanatory rule laid down in *Adams v. Lindsell* (1 B. & Ald. 681) and the offer on July 21, unsupported by any consideration, must be considered in law as having been made by the defendant during every instant of the intervening time until August 19, when a contract was made between the parties by the plaintiff's letter accepting the offer and tendering his shares to the defendant. The defendant has failed, in our opinion, on this ground also to show that the judgment was wrong. The appeal will be dismissed with costs.

Hood, J.—If the plaintiff's case depended solely upon the cause of action set out in the 3rd and 4th paragraph of his statement of claim I should require further time for consideration before I could concur in the judgment of the court. To support that cause of action the plaintiff has to prove as consideration a forbearance to sell his shares founded upon a previous request by the defendant. But my present impression is that the utmost he has proved is an advice not to sell and I cannot in that see any evidence of request, either express or implied. The plaintiff is, however entitled to hold his verdict upon the cause of action set out in the 5th and 6th paragraphs of his claim. If a man makes an offer, either to buy or to sell, and promises to keep that offer open for a given time, and there is no consideration, he is not bound, and may withdraw his offer at any time before it has been accepted, because till then there has been no agree-

ment between the parties. But, if after the offer is made, and while it is open and unretracted, the other party duly accepts, then there is an agreement and both are bound. This is really what the plaintiff here has alleged and what the judge has found to have been proved, and I think there is evidence to justify the finding. Indeed, once it has been determined that the defendant made the offer in earnest it is difficult to argue that he ever retracted it, because according to his own case there was nothing for him to retract as he was in his view only joking. I agree therefore on this ground that the appeal should be dismissed with costs. Solicitors: for appellant *Attenborough and Co.*; for respondent, *Hodgson*.

(Before Higinbotham C.J., Webb and Hood, J.J.)

BROWN v. ROBERTSON.

25th, 26th June.

Principal and Agent—Breach of warranty of authority—distinct allegation of such authority. In an action for breach of warranty of authority to make a contract, a distinct allegation of such want of authority is material and necessary.

Appeal from judgment of Williams, J.

(The facts appear in the judgment.)

Mr. Mitchell and Mr. Irvine appeared for the appellants (defendants.)

Mr. Fink and Mr. Kilpatrick appeared for the respondents (plaintiffs.)

HIGINBOTHAM, C.J.—This is an appeal from the judgment of Williams, J., who had heard the case without a jury, against the defendant Robertson, for £35,000 without costs. A motion by the same defendant for a new trial has been argued at the same time. Several objections to this judgment have been raised by the appellant, and have been fully argued. It is only necessary that we should deal with one of those objections. The action was brought by the plaintiffs against Robertson and the other three defendants upon an agreement alleged to have been made on July 27, 1889, by which, in consideration that the plaintiffs would pay to the defendants—Robertson Clarke and Robert Gayer—£15,000 within five weeks from that date it was agreed that the last named defendants and the plaintiffs should jointly purchase the Homeward Bound mine (subject to the rights of one Barry) for £20,000, and that the defendants should allot to the plaintiffs one-third of the shares in the company to be formed by the defendants. The defendant Robertson in his defence, and the other three defendants in their joint defence, denied that the agreement alleged, or any agreement with reference to the Homeward Bound Mine, had been entered into. The learned judge found amongst other things that the defendant Robertson, purporting to act for himself and the other defendants, made on July 27th, 1889, the agreement as alleged by the plaintiffs. He stated that he was not satisfied upon the evidence that

Robertson had authority from the other defendants, or either of them, to make the contract referred to with the plaintiffs in Sydney, or that the other defendants, or either of them had ever ratified the act of Robertson in making that contract, and he gave judgment for them without costs. The judge granted an application, which had been made by the plaintiffs' counsel at the close of the evidence for the defence, for leave to amend the statement of claim by adding a claim for damages against the defendant Robertson as upon a breach of implied warranty of authority from the other defendants to make the contract of July 27; and he refused the application of Robertson's counsel, who had opposed the application to amend the statement of claim, on the ground that it was too late for an adjournment of the case for the purpose of endeavoring to obtain evidence upon a particular point included in the findings. The learned judge found that the facts necessary to decide the amended claim were before him, and were substantially those which he had already found, and he then assessed the damages against Robertson contingently at £40,000 which was afterwards reduced in the judgment as passed and entered to £35,000. The judge reserved two questions for the opinion of the Full Court. The first was whether the contract as found by the judge fell within the provisions of section 209 of the *Instruments Act 1890*? This question was answered in the negative. The second question was, whether, having regard to the judge's findings, the plaintiffs were entitled upon the original claim, or upon any amendment thereof, which the Full Court might think fit to make, to judgment as against the defendant Robertson, and if so, for what, and in what form? The plaintiffs' counsel admitted with reference to this second question that the plaintiffs could not upon the findings recover upon the original claim. The Full Court, therefore, did not consider or give an answer to the second question. It has been now contended that there was no finding as against the defendant Robertson upon the allegation in the amended statement of claim, that he was not authorised by Clarke or Robert Gayer, or either of them, to make the contract for them. A distinct averment of such want of authority is material and necessary in an action of this kind. *Oxenham v. Smythe* (6 H. and N., 690); *Adamson v. Morton* (7 V.L.R., L. 307). In support of the contract alleged in the original statement of claim, it was incumbent on the plaintiffs to prove that Robertson had authority from the other defendants to make the contract, and the whole of the evidence adduced by them was directed to prove his authority. They failed to do so. The judge did not find that Robertson had not authority, but only that he was not satisfied that Robertson had authority. For the purpose of supporting the alternative amended claim it was incumbent on the plaintiffs to prove the allegation that Robertson was not authorised by the other defendants, and it was necessary that the judge should find the fact of want of authority before judgment could be given against Robertson upon the cause of action stated in the amendment. Gayer and Clarke, in their evidence

denied that they had given authority to Robertson, and judgment was entered for them. But as between the plaintiffs and Robertson upon the amended statement of claim the question of his authority has never been decided, and the whole of the evidence tendered by the plaintiffs goes to show that he had authority. This objection is, in our opinion, a fatal one, and under the circumstances of this case we are not disposed to exercise the power the Court has to grant a new trial of one only of the questions of fact in controversy without interfering with the finding or decisions upon other questions, or to order a new trial. The appeal will be allowed with costs. The judgment will be set aside, and judgment entered for the defendants without costs on the original claim. By leave of the Court the amendment has been withdrawn. No costs of motion for new trial.

Solicitors: for plaintiff, *MacDermott*; for defendants, *Klingender & Co.*

SUPREME COURT SITTINGS.

Before a'Beckett J.,

SHAW V. BRODIE AND ANOTHER.

June 8th and 9th.

Where a vendor without the knowledge and consent of the purchaser makes material alterations in the contract after the purchaser has signed it the vendor is precluded from suing the purchaser on the contract. A contracted to sell land to B under a contract containing inter alia a condition that in the event of any default in the payment of the purchase-money the vendor should be at liberty without notice to rescind the contract and resell the property and sue for the difference in price between the first and second sale or that the vendor might retain such deficiency out of the amount of any of the promissory notes given which should then have been paid repaying unto the defaulter after the resale the residue of such amount and returning without any unnecessary delay any then unpaid promissory notes. Subsequently B assigned his rights under the contract to C who gave his promissory notes for the balance of the purchase-money to A. These notes not being paid at maturity A rescinded the contract and resold the land. Held that A could sue C on his promissory notes and was entitled to recover from him the difference between the prices of the land at the first and at the second sale.

Obiter dicta.—Where A contracts to sell land to B and B subsequently assigns his rights under the contract to C after which A takes C's and not B's promissory notes for the balance of the purchase-money due under the contract and generally treats C and not B as the purchaser, A may by such conduct without express release waive his rights against B.

The plaintiff in this action, by a contract in writing dated the 19th of July 1888 sold to the defendant Brodie a piece of land for the sum of £1724 14s. 9d.

Under the conditions of the contract the purchaser was to pay £150 cash on the signing of the contract, £450 on acceptance of title and the purchaser was then to give his promissory notes for the residue of the purchase money in equal amounts at 12, 24 and 36 months bearing interest at 5 per cent. By the 8th condition of the contract it was provided that if the purchaser should make default in any of his payments the deposit money should be forfeited and the vendor should be at liberty without notice to rescind the contract and resell the property and the deficiency (if any) in price occasioned by such sale and the expenses of such sale should be recoverable from the purchaser as liquidated damages. At the date of the signing of the contract the defendant Brodie paid the deposit of £150 to the plaintiff. On the 13th of August 1888 the defendant Brodie transferred and assigned all his right title and interest in the said contract of sale to the defendant Carter. Subsequently without the knowledge or consent of the defendant Brodie several material alterations were made in the conditions of the contract which alterations the defendant Carter initialled. Following this the defendant Carter paid the sum of £450 on acceptance of title and gave his promissory notes for the residue of the purchase-money in accordance with the terms of the said contract of sale, two of which notes were overdue and unpaid when this action was brought. On the 30th of April 1890 in accordance with the condition in the contract of sale for rescission of the contract and resale of the land on default in payment of any part of the purchase-money the plaintiff resold the property for the sum of £700. The deficiency occasioned by such resale was £424 14s. 9d. and the expenses occasioned thereby amounted to £11 10s. 10d. The plaintiff then brought this action and claimed as against the defendants jointly and severally the sum of £500; or alternatively as against the defendant Carter solely the sum of £500; or alternatively as against the defendant Carter the sum of £858 7s. 6d. the amount of the two promissory notes overdue and unpaid. The defences to the action set up by the defendant Brodie were first a release from the contract upon the assignment to Carter, secondly that after he had signed the contract material alterations were made in it without his knowledge or consent, and thirdly, that the plaintiff receiving the £450 (paid on acceptance of title) from the defendant Carter and by taking the promissory notes of the defendant Carter for the residue of the purchase money instead of his (defendant Brodie's) notes the plaintiff had waived all his claims and rights against him (defendant Brodie.) The alterations, in the contract, complained of were as follows:—

(a) By the 5th condition of the contract it was provided that title to the said land was a certificate of title and the plaintiff by his agents erased the words "the certificate of title to the property sold" and inserted the words "The treasurer's receipt for payment of purchase money of the land by the vendor" in lieu thereof:—

(b) By the 11th condition of the contract it was

(*inter alia*) provided "The purchaser to have an easement over all roads abutting the said section" and the plaintiff by his agents erased and cancelled such condition.

(c) The plaintiff by his agents inserted and added the following conditions.

1 "The title of the vendor to the property sold is a Treasurer's receipt which is to be accepted by the purchaser."

2 "Time shall be considered of the essence of this contract."

(d) The contract expressed that the said land was sold by "John J. Wilson as agent for John Shaw" and the plaintiff by his agents erased the words "John Wilson as agent for." The defences to this action set up by the defendant Carter were first, that there was no contract between him and the plaintiff which would satisfy the Statute of Frauds and secondly as to the action on the notes the defences were (1) that there had been a total failure of consideration and (2) that by the 8th condition of the contract, upon which the plaintiff was suing it was provided that if the power of sale were exercised by the vendor he would return the unpaid promissory notes and the plaintiff having purported to exercise such power of sale he has elected to discharge the defendant and could not maintain an action on the notes.

Mr. Neighbour for the plaintiff read the pleadings and opened the case.

Mr. Bryant for the defendant Brodie.

The alterations made in the contract are material alterations and having been made without the knowledge or consent of defendant Brodie discharge him from the contract, *Suffell v. The Bank of England*, 9 Q.B.D. 555. The conduct of the parties throughout the whole transaction shows that it was intended that defendant Brodie should be released from the contract and that the defendant Carter should stand in his place. Further the plaintiff is estopped from suing the defendant Brodie on the contract for by taking payments from Carter and by taking Carter's promissory notes instead of the notes of Brodie, in completion of the contract, the plaintiff waived his rights against the defendant Brodie. On all these grounds I submit the defendant Brodie is entitled to judgment with costs.

Mr. Irvine (Mr. Topp with him) for the defendant Carter. My client was not a party to the contract and there is no contract as between him and the plaintiff which will satisfy the *Statute of Frauds*. There is no evidence of any contract as between my client and the plaintiff; the only evidence given is of a contract between the plaintiff and the defendant Brodie. The promissory notes sued on were given in pursuance of the contract between the plaintiff and the defendant Brodie and were to be subject to Brodie's rights under that contract one of which was that the unpaid promissory notes if the vendor elected to rescind the contract and resell the property should be returned. There was not any contract between the defendant Carter and the defendant Brodie to

take over the defendant Brodie's liabilities. There was a total failure of consideration with respect to the promissory notes. The plaintiff elected to discharge my client on his promissory notes when he elected to proceed under the contract.

Mr. Neighbour in reply. As to the defence that the alterations in the contract were made without the knowledge and consent of the defendant Brodie there is evidence that such alterations were made both in his presence and with his knowledge and consent. The defendant Brodie has never been released from the contract and is therefore bound under it. As to the defendant Carter he has given his promissory notes to the plaintiff and it must be presumed that the notes were given for valuable consideration. The onus of showing that the notes were not given for valuable consideration rests on the defendant Carter, and in order to give any evidence on that the defendant Carter is obliged to go into the whole of the transaction between the parties and he cannot base his case on the contract for some purposes and repudiate it for others. Counsel during his argument referred to *Muggeridge v. Jones* 14 East 486; *Spiller v. Westlake*, 2 B. and Ad. 155; *Jones v. Jones*, 6 M. and W. 84; *Smith L.C.I.* p. 348; *Cresswell v. Wood*, 10 A. & E. 460.

Cur ad vult.
June 30th.

MR. JUSTICE A'BECKETT.—The plaintiff, a vendor of land, sues the purchaser and the assignee of the purchaser's rights under the contract of sale. Default was made in payment of the promissory notes given by the assignee for the balance of the purchase money. One of the conditions of sale entitled the vendor, in the event of default in payment, to rescind the contract, re-sell, and sue the purchaser for the difference between the price at the first and at the second sale. The plaintiff re-sold, and he now seeks to recover this difference in price from the purchaser and the assignee of the purchaser. He also sues the assignee on his promissory notes. The action has therefore a three-fold aspect. As regards Mr. Brodie, the original purchaser, the defence is that after he had signed the contract material alterations were made in it without his consent, which disentitled the plaintiff to sue upon it. (See *Suffell v. The Bank of England*, 9 Q.B.1.), at p. 562.) There is another defence—that by taking the promissory notes of Carter, the assignee, instead of the notes of Brodie, the purchaser, the plaintiff waived his rights against Brodie. There is a conflict of evidence as to when the contract was signed by Brodie. It is dated the 19th July, 1888. On the 13th August, 1888, after Brodie's rights under it had been assigned to Carter, alterations were made in it by the plaintiff's solicitor, and were initialled not by Brodie, but by Carter. The plaintiff insists that these alterations were made in the presence of Brodie, and before he signed the contract. I am satisfied they were not so made. The date of the contract and the initialling by Carter strongly corroborate the positive statements of Brodie and Carter that Brodie was not present. The three witnesses who contradict them have no clear independent recollection apart from the

document, and one of them—Mr. Stawell—admits that he may be mistaken. I think they are all mistaken in their recollection of the irregular transaction of the 13th August, and their mistake can be accounted for by the fact that on that day the parties did meet in the office of the vendor's agent, which was in the same building as the office of the vendor's solicitor. The altering of the contract after signature may have been justified in the opinion of the persons concerned in the alterations by the sanction of Carter, to whom Brodie's rights under the contract had been assigned, and it may have been then intended by the solicitor (as he suggested in his evidence) to treat the contract as a draft. A copy was afterwards made and signed by the vendor. The vendor now sues by a different solicitor upon the contract, which was altered after the purchaser had signed it. I find that the defence founded on the alteration is sustained. I need not decide whether the other ground of defence has been sustained. By omitting to take from Brodie the promissory notes, which were to be given for the balance of the purchase money, and by his dealings with Carter, the plaintiff may have led Brodie to suppose that he was no longer held liable. A vendor, without express release, may by conduct of this character waive his rights against the original purchaser. (See *Holden v. Hayn*, 1 Mer. 47). I dismiss the action with costs as against the defendant Brodie. Coming now to the case of Carter, the other defendant, he insists that he has not signed any contract, and that though he has the rights of the purchaser he has not his liabilities. He has, however, given promissory notes by which he came under a direct personal liability to the vendor. Two of those notes were overdue when the action was commenced. Treating the action as brought upon these notes, the first defence is that there has been a total failure of consideration. The resale of the property for which the notes were given under the authority contained in the contract does not sustain this plea. (See *Muggeridge v. Jones*, 14 East 486; *Spiller v. Westlake*, 2 B. and Ad. 155; and *Jones v. Jones*, 6 M. and W. 84). The second ground of defence is that under the conditions of sale the vendor having re-sold is precluded from suing on the notes; that he loses his remedy on the notes, and acquires another remedy in the shape of an action for difference of price; that this action can be brought against the original purchaser only, not against his assignee; and that although the right against the original purchaser may have been lost, the assignee cannot be sued on the notes. The contract contains no prohibition in terms against suing upon the notes, in case of resale. In whatever way the vendor's rights might have been qualified as against the original purchaser had he given his acceptances, I think that as against the defendant Carter, who has not signed the contract, and declines to be bound by it, the plaintiff can avail himself of his right of action on the notes. As against his liability at law upon the notes, the defendant Carter sets up an equitable defence founded on the contract with Brodie, and its provisions with regard

to resale; but I think he cannot equitably do this without assuming the liability for the difference in price, which he contends was substituted, and therefore that the plaintiff can recover on the notes restricting the amount, as he is willing to do, to the amount which he could have recovered in an action on the contract for the difference in price on resale. This amounts to £435. I give judgment against the defendant Carter for £435, with costs, except such costs as have been occasioned by the case against Brodie. Judgment for defendant Brodie, with costs against plaintiff. Judgment for plaintiff against defendant Carter for £435, with costs, except in so far as plaintiff's costs have been increased by the case made by him against the defendant Brodie. Refer to tax.

Solicitors for the plaintiff, *Davies, Price and Wighton*.

Solicitors for the defendant Brodie, *G.H.R. and A. E. Osborne*.

Solicitor for the defendant Carter, *J. E. Dixon*.

(Before a'Beckett, J.)

FLORENCE V. HUTCHISON.

9th and 10th June.

A and B entered into an agreement that A was to obtain a ticket on their joint account in a £10,000 sweep on a horse race. A sent for a ticket on his own sole account in a £50,000 sweep but did not inform B of his change of intention. The £50,000 sweep, however, was full and a ticket in the £10,000 sweep was returned to A.

Held that the ticket must be deemed to have been taken on the joint account of A. and B.

A. and B. obtained, on a joint account, a winning ticket in a lottery got up in New South Wales. The prize was paid to A. who refused to pay over to B. his share of the prize. B. sued for the amount. Held that though such a lottery would have been illegal in Victoria yet as it was not illegal in New South Wales, A. could not avail himself of the law against lotteries in Victoria to resist an action by B. to recover his share of the prize money.

In this action the statement of claim set out that—(1.) On or about the 25th day of October, 1890, it was agreed by and between the plaintiff and the defendant, that the defendant should for and on behalf of himself and the plaintiff purchase one ticket in a certain sweepstakes then in process of formation in Sydney, in the colony of N.S.W., known as "Adams" £10,000 sweep, and that the plaintiff and the defendant should each contribute half of the price of the said ticket and should be equally interested in the moneys if any such should be received by the defendant as holder of the said ticket. (2.) In pursuance of the said agreement the defendant purchased a ticket in the said sweepstakes, and on or about the 1st day of December, 1890, the defendant as holder of the said

ticket received the sum of £3303. (3.) The defendant has refused and refuses to pay to the plaintiff his half share in the money so received or any part of the same.

Particulars—One half of £3303	£1651 10 0
Less $\frac{1}{2}$ of £882 laid off by defendant with plaintiff's consent	441 0 0
	<hr/> £1210 10 0

(4.) The plaintiff's claim is alternatively against the defendant for money received by the defendant for the use of the plaintiff and for money found to be due by the defendant to the plaintiff on accounts stated between them

Particulars To $\frac{1}{2}$ of winnings on a ticket in "Adams £10,000 sweepstakes"	£1651 10 0
Less $\frac{1}{2}$ of £882 laid off	441 0 0
	<hr/> £1210 10 0

And the defendant claims £1210 10s. Od.

The defence stated (1.)—Defendant denies each and every allegation in paragraphs 1 & 2 of the Statement of claim. (2) As to paragraph 3 of the statement of claim defendant admits that he refused and refuses to pay to the plaintiff his alleged half share in the moneys alleged to have been so received or any part thereof. (3) The defendant denies each and every allegation in paragraph 4 of the statement of claim. (4) The plaintiff's claim under paragraphs 1, 2 and 3 and the alternative claim under paragraph 4 of the statement of claim arises from the same transaction, viz., the alleged agreement set out in paragraph 1 of the statement of claim and the defendant will object that the money therein claimed is money which if agreed to be paid by the defendant to the plaintiff was so agreed under an agreement by way of gaining and wagering. (5) Defendant will object that the plaintiff's claim under paragraphs 1, 2, and 3, and his alternative claim under paragraph 4 of the statement of claim discloses no cause of action as the moneys therein sought to be recovered purport to be part of the proceeds of a lottery. (6) "Adams £10,000 sweep" was a lottery or scheme for prizes formed to abide the result of a horse race known as the Melbourne Cup in which lottery there were 10,000 subscribers of £1 each, and each subscriber drew by lot a certain number, such number if it corresponded with the number also drawn by lot of a horse successful in the said race entitled the holder to a certain prize and the money claimed by the plaintiff under paragraphs 1, 2, and 3, and alternatively under paragraph 4 of the statement of claim is the plaintiff's alleged share of moneys gained and received by the defendant as a prize in the said lottery in manner aforesaid as the plaintiff well knew and the defendant will object that the action cannot be sustained inasmuch as it arises from a lottery or a scheme by which a prize was gained within the meaning of section 32 of the *Police Offences Act 1890*.

The reply stated (1) As to paragraphs 1 and 3 of the defence the plaintiff joins issue. (2) As to paragraph 4 of the defence the

plaintiff admits that his claim under paragraphs 1 2 and 3 and his alternative claim under paragraph 4 of the statement of claim arises from the same transaction but save as aforesaid the plaintiff does not admit any of the allegations of the aforesaid paragraph 4. (3) As to paragraph 5 of the defence the plaintiff does not admit that the moneys sought to be recovered in the statement of claim purport to be part of the proceeds of a lottery. (4) As to paragraph 6 of the defence the plaintiff says that "Adams £10,000 sweep" was a sweepstakes formed to abide the result of a horse race known as the Melbourne Cup but save as aforesaid he does not admit any of the allegations in the said paragraph 6. (5) The said sweepstakes was formed in the colony of New South Wales and the contract under which the defendant obtained the said sum of £3,303 was a contract entered into by the said defendant in New South Wales and subject to the law of New South Wales and the plaintiff will contend that in the circumstances aforesaid paragraph 6 of the defence does not disclose any answer to the plaintiff's action. (6) The plaintiff will contend that, even if all the allegations in paragraph 6 of the defence be true, which he does not admit, they do not disclose any answers to the plaintiff's claim inasmuch as the plaintiff's claim is not to enforce the said alleged lottery or scheme of prizes. (7) Plaintiff will contend that the defendant is estopped by his conduct in entering into the said agreement in paragraph 1 of the statement of claim mentioned and by his receiving the said moneys in pursuance thereof from raising, or replying upon, the objections stated in paragraphs 4 and 6 of the defence.

Rejoinder, save as to admissions defendant joins issue. [The facts appear in the judgment].

Mr. Irvine for the plaintiff opened the case for the plaintiff.

Mr. Purves, Q.C. and *Mr. Kilpatrick* moved for judgment for the defendant on the ground that the plaintiff was suing on a contract which was void and illegal.

MR. JUSTICE A'BECKETT.—I would prefer to hear the evidence.—The case then proceeded.

Mr. Kilpatrick. The contract is illegal and void *Sykes v. Beadon*, 11 Ch. D. at p.p. 170 and 195. In *Sharp v. Taylor*, 2 Phillips 801, which is the only case at all against my contention, the law was strained to meet the facts because there was only a very small portion of the transaction tainted with illegality. A partnership that is tainted with illegality is incapable of being enforced. *Lindley on Partnership*, 5th Edition p. 93. The plaintiff cannot establish his case without reference to the lottery transaction and if this money was obtained from an illegal source the whole transaction is tainted and the plaintiff cannot recover *Chitty on contracts*, 12 Edition p. 672.

[A'BECKETT J. Is it illegal to get up a sweep.] I submit that it is. This contract cannot be enforced on another ground as it is an attempt to enforce a contract by way of gaming and wagering contrary to the *Police Offences Act* 1890. There is one

case *Bridger v. Savage*, 15, Q.B.D. 353, which appears to be in point on this question but in the whole of this case there is nothing from which it can be determined whether the person employed to make the bets, betted in his own name or in the name of the defendant which point seems also to have struck the Editor of *Chitty on Contracts* 12th Edition at p. 707.

Mr. Irvine in reply.—The first objection is that this is an illegal lottery here in Victoria and that therefore the plaintiff is not entitled to enforce any contract arising out of such lottery transaction. Now I submit that the real test in dealing with cases of this kind is this—where a contract is illegal by the law of the country where it is sought to enforce it but is not illegal by the law of the country where it was entered into, the Courts will enforce it unless it be contrary to the whole spirit and essence of English law, such as Mormonism or contracts in restraint of trade *Rousillon v. Rousillon* 14 Ch. D. 351. But merely making a particular act or transaction illegal by statute, as for instance as is done in Temperance legislation does not make or show that that act or transaction is contrary to the policy of the English law *Westlake's International Law* 1880 Edition p. 239 section 204. I would refer the Court to an English Act which it was necessary to pass in order to stop English people resident in England from entering into foreign lotteries. Our Act is taken with alteration from 10 & 11 Will. cap. 17 but 9 Geo. IV. cap. 19 passed subsequently clearly shows that the original Act was not sufficient to prevent persons in England entering into foreign lotteries and that it was necessary to pass an express enactment to prohibit residents of England taking part in lotteries got up on the continent of Europe. It is quite clear here and cannot be contended for an instant that any attempt to commit a breach either of the law of Victoria or of New South Wales was contemplated I would refer the Court to the case of *Quarrier v. Colson* 1 Phillips 147 which is a distinct authority for the proposition that where a lottery is not rendered illegal by the laws of the country where it is carried on the Courts will not refuse to entertain a contract arising thereout. The case of *Thacker v. Hardy* 48 L.J. Q. B. 289—judgment of Lindley, L.J. shows that though gaming and wagering are prohibited it is not contrary to the policy of the common law of England. The contention of the defendant that this is a contract by way of gaming and wagering and cannot be enforced is not tenable in an action such as this though it might perhaps have been a good defence in an action by the plaintiff against Adams the lottery keeper. The case of *Bridger v. Savage* 15 Q.B.D. 360 gets rid of any defence arising under this point.

Mr. Kilpatrick in reply commented on the cases referred to by counsel for the plaintiff.

Mr. Irvine referred the Court to *Johnson v. Underwood*, N.S.W. L.R. Vol. 5 p. 88.

Cur. ad. vult. June 26th

MR. JUSTICE A'BECKETT.—The plaintiff in this case sues to recover half of a prize won in a lottery, asserting that the winning ticket was bought on behalf of

himself and the defendant. The defendant denies that he agreed to buy on joint account and, I have to determine this question of fact. The plaintiff's story is that in a conversation between himself, the defendant, and one McNeale, fellow workmen, in the employment of the Long Tunnel Gold Mining Company, at Walhalla, arrangements were made for joint ventures in the lotteries, known as sweeps on the Melbourne Cup, got up in Sydney by one Adams. The plaintiff was to go halves with McNeale in one ticket, which the plaintiff was to write for to Sydney, and the defendant was to go halves with the plaintiff in another ticket, which the defendant was to write for. The defendant denies that he agreed to go halves, and says he told the plaintiff he would have all or none. Adams had a £50,000 sweep and a £10,000 sweep. The agreement alleged by the plaintiff was to go into the £10,000 sweep. After his conversation with the plaintiff the defendant wrote to Sydney for a ticket in the £50,000 sweep. That sweep was full, and instead of the ticket he wrote for, he received a ticket in the £10,000 sweep. Soon after getting it he was informed by telegram that he had drawn Carbine, the first favorite, and on the next day the winner of the Cup. The defendant showed the plaintiff the telegram, and he advised the defendant to lay off £1000 against the horse. On the next day defendant showed plaintiff a telegram as to the amount laid off, and in the evening his son showed him another telegram on the same subject. On the day on which the defendant got the ticket conversing with McNeale he denied that the plaintiff was interested in it. On behalf of the defendant it is contended that the plaintiff's demand originated in a conspiracy which has been supported by perjury. The defendant swears that he did not agree to share with the plaintiff in any sweep, and from the first he insisted that he had said he would have all or none. As to this he is contradicted not only by the plaintiff and McNeale, but by other witnesses apparently disinterested. Lintot, a fellow workman, swears that before the race, when questioned on the subject, he said that he had agreed to go into partnership with the plaintiff in the £50,000 sweep, and that as the ticket taken was in the £10,000 sweep, the plaintiff had no interest in it. At a later stage, after litigation had begun, two other witnesses say that he put his case in another way, but still admitting that an agreement had been made, saying that he had agreed to go into partnership with the plaintiff in the £10,000 sweep, that he wrote for a ticket in the £50,000 sweep, and that as he had not written for the ticket he agreed to take with the plaintiff, the ticket sent him was his own. Mr Parker speaks of another conversation, in which the defendant said that the sweep he won was not that which he had agreed to go into. The defendant absolutely denies all these conversations and not only imputes perjury to the witnesses who depose to them but swears that two of them threatened him with it. He says that at the conversation with McNeale and Lintot, when he denied having agreed to go halves, McNeale told him that he and Lintot would swear that he did, and this though

Lintot was not present when the agreement was made. He also says that Whitlow, another witness for the plaintiff, told him that there was a ring got up against him, a swindle got up in the yard in which they would swear "Hell and Tommy" against him. The manner in which the defendant gave his evidence, and objected to answer in cross-examination, impressed me most unfavorably. If I had nothing but his denial to deal with I should have had little doubt in deciding against him. The greatest difficulty in accepting the plaintiff's version of the case is his own conduct. When the ticket was first drawn and when the horse won, he claimed none of the many congratulations which the defendant received in his presence. His recommendations for laying off against the horse were much more in the tone of an adviser than of a partner. The ordinary inclination is to boast of a stroke of luck but the plaintiff seems to have told no one of his good fortune. He gives no explanation of his reticence and on an even balance of testimony this would have great weight against him. I am not, however, prepared to reject his evidence because I do not understand his conduct. The defendant on his part gives no explanation of his having shown the plaintiff the telegrams as to laying off against the horse on the morning and evening of the day on which the race was run which would have been strange conduct for a person knowing that the plaintiff had no interest and was making an unfounded claim to be a partner with him. These are matters calling for explanation and unexplained on both sides. I feel by no means sure that I am right, but, having to assume the functions of a jury, I come to the conclusion that the plaintiff and his witnesses have told the truth and that the defendant has not, and I find the facts to be proved as stated in the first paragraph of the statement of claim. This, however, does not dispose of the case. The defendant having agreed to take a ticket in the £10,000 sweep did not apply for one in that but for one in the £50,000, so that the ticket in the £10,000 which he afterwards got was not that which he applied for. It was one which he was instructed to get and as he obtained no other which would satisfy the promise made to the plaintiff I think he is not at liberty to say that he acquired it on his own account. I believe that when he applied for a ticket in the £50,000 sweep he thought the application a permissible deviation from his instructions and that if the ticket which he obtained in answer to this application had been a blank he would have asked for and received half the price of it from the plaintiff. Taking it to be a fact that the defendant had agreed to obtain a ticket for the plaintiff and himself I think that if he had afterwards altered his mind and determined not to go in with the plaintiff but to apply solely on his own account he would have taken precautions to inform the plaintiff of the change of intention. It would certainly have been his duty to do so. I think, therefore, that the ticket obtained by the defendant is to be deemed as taken on the joint account of himself and the plaintiff. I have now to deal with the defence of illegality

that the agreement alleged is one by way of gaming or wagering, and that the money sued for was won in a lottery, and therefore cannot be recovered. This is not a case in which the money sued for was paid to the defendant for the use of the plaintiff. It is therefore necessary to resort to the agreement entered into between them to prove that the plaintiff is entitled to anything, and if that agreement is illegal the plaintiff can recover nothing. If instead of buying a ticket in a sweep the defendant had backed a horse in partnership with the plaintiff, won the wager, and received the moneys, the plaintiff could recover his half. See *Johnson v. Lansley*, L.R. 12 C.B. 468 and *Beeston v. Beeston* L.R. 1 Ex. D. 13. An agreement to make a bet is not illegal, though as between persons betting with one another the money won cannot be recovered by action. This Court has ordered accounts to be taken of a partnership in a betting business. *Hill v. Stewart* 13 V.L.R. 76. Men who live by betting are put upon the jury panel and called in court by their avocation as "bookmakers." This would not be done if the avocation were illegal. Getting up a lottery in Victoria such as that in which the prize in this action was won would be illegal under sec. 37 of the *Police Offences Act*, but it was neither alleged nor proved that the lottery in which the prize was won in New South Wales was illegal under the law of New South Wales. Apart from positive enactment I see nothing to render the taking of a ticket in a lottery illegal. I think it is not illegal for persons in Victoria to agree to take a ticket in a lottery to be got up and drawn in a country out of Victoria, where the lottery is not illegal. On the continent of Europe state lotteries are common enough, and the agreement proved in this case is no more illegal than would be an agreement between persons in Victoria to subscribe for a ticket in a state lottery in Europe. Suppose such an agreement were acted upon, and money won in the lottery were sent to Victoria to one of the subscribers, he could not successfully resist an action by his partner to recover his share, nor can the defendant here avail himself of the law against lotteries in Victoria, to keep the plaintiff's share of a prize won in a lottery in New South Wales. I therefore give judgment for the plaintiff, with costs. According to the defendant's answers to interrogatories, he was paid for the prize £3,292 10s. From this has to be deducted £1, the price of the ticket, £882 laid off, and (as I gather from the evidence) £25 paid to Mr. Jolly for commission, making £908 to deduct, and leaving £2,384 10s. to divide, half of which is £1,192 5s. I give judgment for the plaintiff for £1,192 5s., with costs.

Solicitors for the plaintiff, *Williams and Matthews*; solicitors for the defendant, *Madden and Butler*.

IN CHAMBERS.

(Before Hodges, J.)

IN THE ESTATE OF JOSEPH CHADDER DIMOND.

BICKFORD v. BANK OF AUSTRALASIA.

April 30th, June 11th.

Trusts Act 1890 (No. 1150) sec. 39—New Trustees—A surviving trustee has a discretion to exercise in the appointment of new trustees and this discretion must be exercised without being controlled by any other person—Where a surviving trustee and the administratrix of a deceased trustee join the appointment of new trustees such appointment is invalid.

Originating summons asking the opinion of the Judge as to whether an appointment of new trustees by a surviving trustee and the administratrix of a deceased trustee was valid, and if so asking for an order that the Bank of Australasia do pay out to such new trustees a sum of money which had been lodged in the bank by the surviving and the deceased trustee, alternatively, that if the appointment be not valid, that certain persons be appointed as new trustees.

Mr. Ogier in support contended that the appointment was valid and that the bank should be ordered to pay the sum to the new trustees.

Mr. Anderson on behalf of the bank contended that the appointment was bad and stated that the Bank was quite willing to pay the money as soon as the new trustees were properly appointed.

HIS HONOR on a subsequent day said:—In the matter of *The Statute of Trusts* and in the estate of Joseph Chadder Dimond, deceased. In this case Joseph Chadder Dimond, by will dated November 23rd 1880, bequeathed his property, after the payment of certain legacies, to two trustees, Nicholas Harley and Joseph Chadder Bickford, on trust for the benefit of his daughter Annie Mary Chadder Dimond on her attaining the age of 18 years. The testator died in 1884 and the executors and trustees obtained probate of the will and entered on the duties of the trust. Harley died intestate in 1889, leaving Joseph Chadder Bickford as the surviving trustee and executor, and his widow Elizabeth Harley obtained administration of his estate. The surviving trustee and this administratrix by deed dated June 3rd, 1890, jointly appointed two persons, named Samuel Lancaster and Thomas Thompson, as trustees, and this appointment was intended to be a proper appointment under section 39 of the *Trusts Act*, 1890. That section is as follows (His Honor here read the section.) In this case there was a surviving or continuing trustee, and he could have properly appointed under that section; but there was joined with him in the appointment the administratrix of Nicholas Harley, the deceased trustee. Now it has been contended on behalf of the applicant that this deed was good, though executed by two persons one of whom was incompe-

tent to act, and I was referred to *Smith's Real and Personal Property*, (3rd Edit) at page 610, where it is stated that if several join in a deed and some are able to make such a deed and some are not able, the deed is deemed to be the deed of the former alone. The present case, however, is quite different. I can see that if an owner of land joins with others who have no interest in it in a deed conveying that land that such a deed may be construed as the deed of the owner alone so as to pass the property. In the present case there is a power, which is given to the surviving trustee, and this is a power to appoint and there is a discretion to be exercised in conveying the trusteeship. This appointment differs therefore from an ordinary deed conveying property, because the person appointing has a discretion to exercise and this discretion must be exercised without being controlled by any other person. The joint discretion of two persons may be totally different from that of one of them, and the person appointed by the two might be quite different from the person who might be appointed by either of them acting singly. In the case of *Minchin v. Minchin*, 3 Ir. Ch. Rep. at page 181, the Master of the Rolls in giving judgment said "In the case of *Hole v. Escott* (4 M. and Cr. 187), where the husband and wife had a joint power of appointment, and in default of such joint appointment the survivor had such power, the husband and wife executed a joint appointment, which was held not to be valid in consequence of the husband's bankruptcy; and it was decided that the joint appointment was not valid as the appointment of the wife, she having survived." In that case, therefore, where there was a power to appoint jointly with a right to the survivor to appoint in default of a joint appointment, and the parties executed what purported to be a joint appointment, such appointment was held not to be good since one of the parties was incompetent by reason of his insolvency; and the bankrupt having died it was held that the deed could not be considered a valid separate appointment by the wife, who survived. I therefore hold that the appointment of June 3rd, 1890, is not valid under section 39 of the *Trusts Act*, and I therefore answer that question in the negative and disaffirm the appointment of Samuel Lancaster and Thomas Thompson as trustees under that deed. There are, therefore, no trustees properly appointed of this estate, Joseph Chadder Bickford, the surviving executor, having since died. I am accordingly asked to appoint trustees under section 34 of the *Trusts Act*, 1890. (His Honor here read the section). In this case it is not only expedient but necessary to appoint new trustees, and under the circumstances this would be extremely difficult without the help of the Supreme Court. I will therefore act under that section, and as I think that the affidavits of the fitness of these persons to act as trustees are sufficient, though barely sufficient, I will appoint Samuel Lancaster and Thomas Thompson trustees. Costs of parties out of the fund. Reserve further consideration and liberty to apply.

Solicitors; for plaintiff, *Fleetwood*; for defendants, *Malleson, England*, and *Stewart*.

(Before Hodges J.)

MCKENZIE AND COMPANY V. WALKER; McMAHON,
GARNISHEE.

June 9, 10, 1891.

Rules of the Supreme Court 1884—Order XLV., r. 1—Attachment of debts—Garnishees. A garnishee order does not make the garnishee a debtor of the garnishor and therefore, where a garnishee order was still unsatisfied, the garnishor cannot attach debts due to the garnishee.

This was an application made on behalf of H. McKenzie & Co., for leave to attach a debt due by the Rodney Irrigation and Water Supply Trust to one Thomas McMahon. McKenzie & Co. had recovered judgment against James Walker and had obtained a garnishee order attaching money in the hands of Thomas McMahon due and owing by McMahon to Walker. The garnishee order had never been satisfied and it was sought by virtue of that order to attach moneys in the hands of the Rodney Irrigation and Water Supply Trust which were owing by the Trust to Thomas McMahon.

It was submitted on behalf of the judgment creditor that there was power under the provisions of Order XLV. r. 1, to attach those moneys and that similar orders have been made in this Court.

His Honor said—I am certainly at present very much against such a construction of Order XLV., but I will consider the question.

C.A.V.

HIS HONOR on a subsequent day said—In this case the judgment creditor obtained an order absolute to attach a debt in the hands of one McMahon and having by that order attached the debt due by McMahon to Walker. He has applied for an order attaching a debt due from another person to McMahon. The question I have to determine is whether I have jurisdiction or power to make such an order. It is contended by the judgment creditor that where a person has under Order XLV. r. 1, obtained an order for the payment of money power is given by that rule to obtain a garnishee order against another person who owes money to the individual against whom the order is made. It is also urged that as every order has to some extent the same effect given to it as a judgment he can attach such a debt under that rule. In my opinion that contention cannot be supported. Order XLV. r. 1, gives power to a person who has obtained an order for the recovery of money to attach that money after an examination of the debtor liable under such judgment or order. It must be, however, a debtor liable under such judgment or order and unless he is a debtor liable under such judgment or order he does not come within the provisions of rule 1. The language of the rule refers to a person indebted "to the judgment debtor" and further on it speaks of "debts owing or accruing from such third person to the judgment debtor." Rule 2 refers to service of an order "that debts due or accruing to a debtor liable under a judgment

or order." Then rule 3 speaks of "the amount due from him" (the garnishee) "to the debtor liable under a judgment or order." Rule 7 refers to the discharge to the garnishee by payment "as against the debtor liable under a judgment or order." All these rules to my mind clearly point out that the relation of debtor and creditor must subsist between the person who has obtained the order and the person against whom the order is obtained before that order can be the foundation of an application for garnishee order. In the forms given in Appendix K, form No. 40 the language used points to the same conclusion; that clearly places the person obtaining the order and the person against whom the order is made in the relation of creditor and debtor. I have therefore to see whether the relation of creditor and debtor exists between the garnishor and garnishee, for unless that relation exists between them Order XLV, r. 1., will not give me power to make a garnishee order. The question of the relation between garnishor and garnishee has been discussed before the Court of Appeal in the case of Combined Weighing and Advertising Machine Company (48 Ch. D. 99.) The head note to that case gives a correct summary of the case upon the point. (His Honor read the head-note). The question which had to be decided in that case was whether the garnishor could petition for the winding up of the garnishee, the garnishee being a company, upon the ground that the garnishor was a creditor of the garnishee by reason of the attachment order; it was first decided by North J., that he was not a creditor within the meaning of the section relating to the winding-up of a company and the case was then taken to the Court of Appeal. Bowen L. J. in giving judgment said "I think in all probability having regard to the language of the preceding section and I will assume though it is not necessary to decide it, that a creditor under section 82 includes a creditor in equity as well as in law. It is not necessary, as I say, to decide it and I believe it was left undecided in a case before one of the Vice-chancellors. I should think it would include it." What he there decides is that there was not a debt in law or equity due from the garnishee to the garnishor and consequently the garnishee could not be a debtor of the garnishor in law or equity. Bowen L. J., goes on to say "there is an order of a Court of Common Law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor or as an alternative that execution may issue; but I think that the relation which is created by that section and the orders made under it does not create a debt at all; it creates an attachment of a portion of the debt and in case of non-payment confers the right of issuing execution and nothing more." Fry L. J. says "it is equally plain to my mind that the garnishee order therefore does not make the garnishor a creditor of the garnishee. What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee you shall not pay to your creditor the money which you owe him. It enables him to give a valid receipt and discharge for

the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights but there is no transfer of the debt and he is not created a creditor. If the garnishor is not created a creditor the garnishee is not created a debtor. I have gone very carefully into this matter because I was informed that orders have been made under similar circumstances to the present.

Order refused.

Solicitor for applicant, W. H. Lewis.

Before Webb, J.,

MUIR (falsely called SUTHERLAND) v. SUTHERLAND.

Marriage Act 1890 (No. 1166) sec. 111—Nullity of marriage—Sec. 111 of Act No. 166 does not apply to suits for declaration of nullity, and therefore a Judge has no such jurisdiction, in such suits, to make an order that a sum of money be paid into Court to enable the female petitioner or respondent to have the merits of her case investigated by a proctor. Application on behalf of the petitioner under sec. 111 of the *Marriage Act 1890* for an order that the respondent pay into Court a sum of money sufficient to enable her to have the merits of her case investigated by a proctor.

Mr. Sievwright in support.

Mr. McKean to oppose.—The present petition is one for a declaration of nullity of marriage. The application is made under sec. 111 of the *Marriage Act 1890* but that section applies only to suits for divorce or separation and not to suits for nullity. This is further shown by the fact that sec. 111 is taken from sec. 7 of the *Divorce Act 1889* and that Act applied solely to suits for divorce and separation.

HIS HONOR said :—This is an application by the petitioner in a suit for a declaration of nullity of marriage that the respondent may be ordered to pay into Court a sum of money sufficient to enable her to have the merits of her case investigated by a proctor. The application is made under sec. 111 of the *Marriage Act 1890* and in my opinion that section does not apply to suits for a declaration of nullity. Sec. 111 is taken from the *Divorce Act 1889* and the whole of that Act relates to suits for dissolution of marriage and for judicial separation. Sec. 110 of the *Marriage Act 1890* provides that "In any suit or other proceeding instituted for dissolution of marriage or judicial separation . . . the Court may in such suit give &c." and sec. 111 provides that "when a wife in any such suit &c." I must give some meaning to the words *such suit* and I could give no meaning to them except to hold that they relate solely to suits for dissolution of marriage and judicial separation. As I have no jurisdiction to make the order under this section I dismiss the application with £1 1s. 0d. costs.

Proctors for petitioner Sievwright; for respondent McKean and Leonard.

SUPREME COURT SITTINGS.

(Before a'Beckett, J., and a jury of six.)

BALLANTYNE v. THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK.

May 28th—June 3rd.

Where a person in his application for an insurance policy warranted that he would not die by his own act and subsequently shot himself while of unsound mind and the jury found that he was so insane when he shot himself as not to know that the result would be death. Held that the object of the contracting parties must be looked at and that as no thought of death had entered the mind of the insured when he fired the fatal shot the act could not have been prompted by any intention that others should profit by his death and was not therefore such an act as the company intended to protect itself against and did not therefore void the policy.

A insured his life in B company. C the local manager of the company when taking A's application for insurance read over to A the usual application paper of the society, which contained a number of questions relative to the health and condition of the insurer, and as he read out such questions he wrote down A's answers thereto opposite each question. One of these questions C either deliberately or carelessly misrepresented the meaning of, the effect of which was to make A's answer thereto false. The application also contained a warranty by the insurer that his answers were true. A signed the application paper without reading it.

Held that the company's manager having deliberately or carelessly read a question in such a manner as to entrap the insured into an untrue answer the company could not be permitted to take advantage of the untrue answer as a breach of warranty vitiating the insurance.

This was an action to recover the amount of £2500 upon a certificate of insurance. The Statement of Claim set out (1.) By a certificate of insurance bearing date September 5th, 1890 and also numbered 10600 the defendant company for the valuable consideration in such certificate mentioned insured the life of David Ballantyne for the sum of £2500 in favor of the plaintiff for the term of four months from the said date; to wit until January 5th, 1891 upon and subject to the terms in such certificate mentioned. (2.) The said David Ballantyne died on the night of October 7th, 1890 or the morning of October 8th 1890. (3.) The defendant company has refused to pay the plaintiff the said sum or any part thereof and the plaintiff claims £2500.

Amended defence—(1.) The certificate mentioned in paragraph 1 of the statement of claim was made upon other considerations hereinafter mentioned beside the valuable consideration in the said paragraph 1 referred to, and save as aforesaid the defendant does

not admit the said paragraph 1 without the production of the said certificate. (2) The defendant admits paragraphs 2 and 3 of the statement of claim. (3.) The defendant says that the said certificate of insurance was made in consideration of the application or proposal for the said certificate or policy as well as of certain valuable considerations in the said certificate or policy mentioned and the said application or proposal was expressly made and is part of the said contract of insurance, and the said application or proposal contained amongst others a warranty or agreement by the said David Ballantyne that he would not die by his own act during the period of two years from the date of the issue of the policy, for which application was by the said application or proposal made, and the defendants say that the said David Ballantyne did within the said period of two years die by his own act, to wit, by shooting himself whereby the plaintiff became and was and is disentitled to receive the amount insured by the said certificate or policy. (4) The defendant further says that with a view to obtaining the said insurance referred to in the statement of claim the said David Ballantyne made a certain proposal or application to the defendant for the said insurance and he thereby agreed that all the statements which he had made in the said proposal or application were by him warranted to be true and were offered to the defendants as a consideration of the contract of insurance for which it was such proposal or application and the said certificate or policy in the statement of claim mentioned was in fact made in consideration of the said proposal or application as well as of certain valuable consideration in the said certificate or policy mentioned and the said proposal or application was expressly made and was and is part of the said contract of insurance, and the said proposal or application contained amongst others a warranty by the said David Ballantyne that no proposition or negotiation or examination for life insurance had been made by him to the defendant or any other company or association in which a policy had not been issued. Whereas in truth and in fact a proposition and a negotiation and an examination for life insurance had been made by and of the said David Ballantyne in another company or association, to wit, in the Equitable Insurance Company of the United States in Melbourne on which a policy had not been issued within the meaning of the said proposal or application and the defendants say that by reason of the premises the said certificate or policy of insurance became and was and is void and of no effect.

Reply.—(1) The plaintiff joins issue. (2) The plaintiff will object that the said certificate sued on is not the contract or policy referred to in any of the said warrants or agreements in the defence mentioned (3.) The policy referred to in the said warrants and agreements has never been issued. (4) If the said David Ballantyne died by his own act (which the plaintiff denies) she says that the said act was not voluntary or intentional. (5) If the said David Ballantyne died by his own act (which the plaintiff denies) she says that he was at the time of such act so insane as to be

unable to understand the nature and consequence thereof, could be to cause his death. (6.) If the said warranty alleged in paragraph 4 of the defence was made in writing by the said David Ballantyne and if such proposition and negotiation and examination had been made as in the said paragraph 4 alleged the defendant ought not to be allowed to set up or rely upon the same or on the breach thereof, for that the defendant by its agent Mr. Booth was well aware at the time the said warranty was made that the said proposition negotiation and examination had been made. (7.) If the said warranty alleged in paragraph 4 of the defence was made in writing by the said David Ballantyne the defendant ought not to be allowed to set up or rely upon the same or the breach thereof for that the said David Ballantyne made the same, unless under the following circumstances only, that is to say, the defendant by its agent Mr. Booth on the occasion of the said David Ballantyne making the proposal referred to in the said fourth paragraph of the defence asked the said David Ballantyne whether he the said David Ballantyne had been declined or postponed by any other company to which the said David Ballantyne answered, No! and the defendant's said agent thereupon wrote the said answer No! after and in conjunction with certain other questions printed on the said proposal, viz., as to whether any proposition negotiation or examination for life insurance had been made by or of the said David Ballantyne in the defendant Company or any other company and the said David Ballantyne did not read the said proposal and did not know or believe he was warranting as alleged by the defendant or otherwise than as hereinbefore aforesaid and the defendant's said agent represented to the said David Ballantyne who believed that he the said agent was faithfully recording on the said proposal the answers of the said David Ballantyne and not otherwise, by reason whereof the said David Ballantyne signed the said proposal. (8) The plaintiff will object as to paragraph 4 of the defence that the mere fact that the certificate sued upon herein was made in consideration of the said proposal will not entitle the defendant to avoid the said certificate for breach of the said warranty. (9) The plaintiff will further object that the defendant is not entitled to treat the said certificate as void inasmuch as the defendant still retains and has never tendered or offered back the premium or any part of the consideration paid to the defendant by the said David Ballantyne for the said certificate.

Rejoinder.—(1) The defendant joins issue. (2) The defendant will object that the matters alleged by paragraphs 4 and 5 of the reply, respectively, even if true (which the defendant denies) do not according to the true meaning of the said certificate or policy afford any answer to the portion of the defence to which they are respectively pleaded. (3) The defendant will object that even if the matters alleged in paragraph 6 of the said reply were true (which the defendant denies) they do not afford any answer to the portion of the defence to which the same are pleaded for that the mere knowledge of the said Mr. Booth if

he were the company's agent (which it denies) would not prevail against the said express warranty. (4) The defendant will object that even if the matters referred to in paragraph 7 of the reply were true (which it denies) they afford no answer to the portion of the defence to which they are pleaded for that they do not allege that the said Mr. Booth if he was in fact the agent of the defendant (which it denies) fraudulently did what he is thereof alleged to have done nor that the said David Ballantyne was illiterate or incapable or that he had not full means and opportunity to know the nature and effect of the warranty which he in fact signed and gave to the defendant.

This was an action brought by Joanna McLean Ballantyne the widow of David Ballantyne to recover £2,500 the amount of a policy of insurance for four months effected by the deceased husband with the defendant company. On the 5th of September 1890 the deceased David Ballantyne applied to insure his life for £2,500 in the defendant company. Previous to this Mr. Ballantyne had applied to the Equitable Insurance Society of the United States to effect an insurance upon his life and he was examined by two of the doctors of that society who recommended the postponement of the application. Before, however, his application came before the directors of the company he obtained leave to withdraw it and withdrew it accordingly. Subsequently as above stated Mr. Ballantyne applied to the defendant company. He was duly passed as a good life by the medical officers of the company. Following this he had an interview with Mr. Booth, the Manager in Melbourne of the Company, the head office of the Company being in New York, America. Mr. Booth then read out to Mr. Ballantyne the usual application form of the Society, which contained a number of questions relative to the health and condition of the person proposing to insure. As Mr. Booth read over these questions Mr. Ballantyne answered them and Mr. Booth wrote down the answers opposite each question. When Mr. Booth came to question 15 in the application which was therein set out as follows:—"Has any proposition or negotiation or examination for life assurance been made in this or any other Company or Association on which a policy has not been issued." Mr. Booth, according to the evidence for the plaintiff, read the question out thus "Have you proposed elsewhere, been declined or deferred." To this, according to the evidence for the plaintiff, Mr. Ballantyne replied "No, but I proposed to the Equitable you know." Mr. Booth said "Yes, but I understand that that proposal was withdrawn and was not dealt with by the directors." Mr. Ballantyne said "Yes," and Mr. Booth then wrote the answer "No" opposite to question 15 in the application paper. This evidence was contradicted by Mr. Booth himself, but the jury found in favor of the plaintiff's version. After Mr. Booth had finished reading the questions and writing down the answers given by Mr. Ballantyne he handed the application paper across to Mr. Ballantyne who signed the paper, but, according to the evidence, without reading it. In the form of application the assured

covenanted as follows: "I also warrant and agree that I will not die by my own act during the said period of two years," viz., two years following the date of the policy for which application was made. In the form of application the assured also agreed that all the foregoing statements and answers were warranted by him to be true. This application having been duly signed by Mr. Ballantyne, he paid his premium for the first year, and a certificate of insurance covering him for four months was issued to him by the defendant company signed by Mr. Booth and countersigned by Major L. C. Rennie, the General Manager of the Company for Australia. The procedure of the Company as to insurance is as follows: The Company here having accepted the application of the insurer receives from him the premium on the policy for which he is applying for one year, upon which the Company issues to the insurer a certificate of insurance covering his life for four months. The particulars of the application are then sent to New York, and the Head Office issues a "proper policy" which is anti-dated as of the same date as the four months certificate of insurance. If the Head Office declines to issue a "proper policy" the insured is entitled to a return of the premium paid on the certificate of insurance less *pro rata* amount for four months protection. This certificate of insurance was issued to Mr. Ballantyne on 5th of September, 1890. On the 8th of October, 1890, Mr. Ballantyne was found dead near his residence at Caulfield, with a gunshot wound in the head, and on the 9th of October, 1890, an inquest was held on the body and the jury found that he "was found dead in a paddock at Caulfield adjoining the house, having died from a gun shot wound self inflicted while of unsound mind." The officers of the Company in New York never issued a "proper policy" as the deceased committed suicide before the matter came before them.

The action was tried before a judge and a jury of six.

Mr. Isaacs and *Mr. Mitchell* appeared for the plaintiff.

Dr. Madden and *Mr. Higgins* appeared for the defendant company.

At the close of the summing up His Honor submitted the following question to the jury which were answered by them as hereinafter shown.

1. Did Mr. Ballantyne shoot himself? Answer, yes.

2. Was he insane when he shot himself? Answer, five say yes.

3. Was he so insane as not to know that firing the gun into his own head would kill him? Answer, five say yes.

4. Did he, whether insane or not accidentally shoot himself? Answer, no.

5. Did Mr. Booth at the time of filling up the answer to question 15 in Mr. Ballantyne's application to the defendant company know of the "proposition negotiation and examination" which had taken place with respect to the Equitable Company? Answer, Yes.

6. Did Mr. Booth read such question or state the effect of such question to Mr. Ballantyne in such a manner as to inform him of the true purport of such question? Answer, No.

7. Did Mr. Ballantyne know the true purport of such question when the answer "no" was filled up by Mr. Booth? Answer, No.

8. Had Mr. Ballantyne the means of informing himself of the true purport of such question by reading it before signing the application? Answer, Yes.

On these findings leave was reserved to either party to move for judgment.

Mr. Isaacs moves for judgment on the findings of the jury. Although the mere fact of insanity is not an answer to the undertaking given by the insured the fact that he was so insane when he shot himself as not to know the physical consequences of his act is an answer. The object of the clause is to prevent the insured from being tempted to take his own life for the benefit of his family. The jury having found that the insured did not know what would be the effect of firing off the gun the plaintiff is entitled to judgment *Borradale v. Hunter* 5 M. and G. 639. *Clift v. Schwabe* 3 C.B. 437. *Dufaur v. Professional Life Assurance Company* 25 Beav. at p. 602, *Horn v. Anglo Australian &c., Life Assurance Co.*, 30 L. J. Ch. 511. The next case I would refer your Honor to is *Dean v. American Mutual Life Assurance Company*, 1 Bigelow L.I. Cas. 195, which refers to most of the previous English and American cases and sums up the whole law on this point, viz.—that a policy conditioned to be void if the assured die by his own hand is voided by self-destruction knowingly and intentionally caused during a state of insanity. The case of *Cooper v. Massachusetts Insurance Company*, 1 Bigelow L.I. Cas. 758, arrives at the same result, in *Bigelow v. The Berkshire Life Insurance Company* 19 American Reports p. 628, the policy contained the condition "sane or insane" and it was held that the company would have been liable if the insured had not intentionally killed himself. I would also refer the Court to the American work *Bliss's Life Insurance* pp. 346 and 380. To go now to another point the only other defence raised was that Mr. Ballantyne gave a specific warranty to a particular question and the jury have found that that question was never put. The company asked one question and put the answer down to a different question. The insured puts his name to the bottom of the document trusting in the company, and the company cannot now be allowed to say "What you told us was not true and the policy is void." Such a proposition is not maintainable. *The American Insurance Co. v. Mahone*, 5 Bigelow, L.I. Cas. p. 567 and *Jones v. The Queen Insurance Co.* 2 V.R. (L) 127 which is a somewhat similar case. The company cannot be allowed to say that they will rescind the contract when the parties cannot possibly be restored to their position. The agent has taken the premium and holds it. He put to the insured a question that never was on the paper and put down the answer to his question as the answer to another question. There is

another point of law though it is scarcely necessary to argue it on the findings of the jury. The point is this—these are warranties to another policy. The position seems to be this, a person desires to insure and says to the company "I will pay you a premium to cover a whole year, give me a policy for a year." They say "Your application is for a policy for a year. We cannot give you a policy for a year now, it must be referred to New York. However, we will take your premium but there shall be no contract between us. But in consideration of your making an application for a policy for a year, as to which there is no contract at all until the directors choose to issue the policy, we will, apart from all these considerations, give you a certificate for four months."

[A'BECKETT J. :—But that would be on the conditions on which the policy would have issued. I should say I would be against you on that point.] I don't want to abandon the point though no doubt it is not nearly so strong as the others.

Dr. Madden :—I do not propose to argue the last point raised by my friend, but if your Honour entertains it at all I would ask to make the necessary amendment that would embody the last clause of this application as the object of the contract "I also agree that all the foregoing statements and answers, etc." If my friend's objection is urged that these conditions relate only to the policy that would be issued from New York it would be subject to this view, that this policy would have no effect whatever until that policy was issued. Therefore so far as my friend relies upon that application I submit that we are entitled to amend in that way because that is an amendment that follows as a necessary consequence the interpretation sought to be placed upon the transaction by my friend. Turning now to the first point. The question, as we have to deal with it, whether or no the killing of himself by Mr. Ballantyne, relieved the society seems to me to remain absolutely untouched. In *Borradaile v. Hunter* 5 M. and G. 639, the argument was that suicide would only relate to felonious suicide and the court decided that it might relate to every suicide, and in *Cleft v. Schwabe* 3 C.B. 437, the same conclusion was arrived at. In arriving at that conclusion, two classes of suicide were differentiated between, and a great number of observations more or less rhetorical were made by the learned judges to emphasise and illustrate their arguments but they form no part of the judgment. In *Dufaur v. The Professional Insurance Company* 25 Beav. 599, and in *Horn v. Anglo-Australian Company* 30 L.J. Ch. 511, the court held that so far as the suicide was concerned the policy would be void, but because the policy contained additional provisions that it would not be void as against an assignee the plaintiff succeeded. In *Dean v. The American Mutual Life Assurance Society* 1 Bigelow L.I. Cas. 195, it was found that the insured had killed himself intentionally so the question was not raised. The only case not cited by my friend which it is submitted comes nearer to this case than any other is *Stormont v. The Waterloo Life Assurance Company* 1 F. and F. 22. The real question, however,

is this :—Did the insured do the act? It does not signify whether he knew what the consequences would be. Did he do the act? That seems to be the real principle involved in this case and the jury have practically found in favor of the defendant. The insured warrants that he will not die by his own act within two years and the only question that concerns the company is whether he died by his own act and the question whether he was sane or insane or what the condition of his mind was, cannot be raised. The suggestion by my friend that this clause is inserted to prevent the insured from committing suicide in order to benefit his family cannot I submit be sustained; this is a contract by which the assured warrants that he will not die as the result of his own act. That warranty is absolute and once broken the contract is gone.

[A'BECKETT, J.—If the question merely was whether he did the act or not why did the courts in the cases cited by Mr. Isaacs, discuss the subject at such great length. They certainly seem by their judgments to decide that it is necessary that the act should be intended to cause death.]

None of those cases were like this. In those cases a stipulation was made by the insurers and the question arose as to what they sought to protect themselves against, being only stipulations the matter was open to discussion as to what was the meaning of the parties. Here, however, is a different state of circumstances. Here is an absolute warranty which shuts the door against any discussion. The question with which we are concerned here is I venture to say did the insured fire the gun into his head intending to fire it into his head and whether he knew it would kill him or not seems to me to be beside the question. Supposing a man feels an ache in his arm and sets to work with a carving knife and cuts his arm off and bleeds to death surely in that case he would be taking his life by his own act.

[A'BECKETT, J.—I should doubt it. He would die performing an unsuccessful surgical operation.] Nevertheless it would be by his own act.

The next point is as to question 15. The insured is asked if any negotiations have been carried on with any company with respect to which a policy had not been issued, and to this question he answered "No" and signed his name to it. In this written contract he not only answers the questions in that way but he warrants that his answers are true and this I submit is a bargain in writing which cannot be varied by any parole evidence of what led up to it or what transpired between the parties as to it. Parole evidence of conversations or negotiations between persons apart from this written document cannot in any way affect it. When a person in sound health and able to read and write signs a document which he has the opportunity of reading he will not be permitted to depart from the document under any circumstances short of fraud pleaded and proved. The case of *Foster v. MacKinnon*, L.R. 4, C.P. p. 704, shows that persons who are not in a position to protect themselves will be relieved but even in their cases the protection is taken away if they

have been guilty of negligence in signing the document against which they seek to be relieved. This then goes the length that the court will not relieve a person from the binding effect of his signature on the ground that somebody else read the document to him provided that he was himself able to read and had the opportunity of reading it for himself. *Hunter v. Walters*, L.R. 7 Ch. Ap. 75, is another case in point. I submit therefore that under no circumstances short of absolute fraudulent contrivance by which a person is trapped into signing a document over which he has no control will be relieved from the binding effect of his signature. In the case of *Anderson v. Fitzgerald*, 4 H. of L. Cas. 484, it will be observed that it seems taken for granted that if the two representations which were the subject of enquiry had been warranted, there would have been nothing to discuss at all. But the Court held that notwithstanding they were not warranties inasmuch as they were made the basis of the contract the question of materiality was nothing to the purpose and must not be inquired into. There are also the cases *McDonald v. The Land Insurance Company*, L.R. 9, Q.B. p. 328, *Geach v. Ingall* 14 M. and W. 95 and *Cazenove v. The British Equitable Assurance Company* 6 O.B.N.S. 437, which are cases precisely to the same effect. There can be no departure from the words in the document. If a mistake has been made the proper course is to apply to rectify the instrument.

There is another point raised that this document ought not to be read as it purports on its face, because Mr. Booth, the agent of the Company, was well aware at the time the said warranty was given that the said proposition, negotiation and examination had been made and then another estoppel is sought to be pleaded, viz., that Mr. Booth read question 15 in a particular fashion. Now I submit that that imposes on the plaintiff the obligation of proving that Mr. Booth was the agent of the Company to do these things and not a tittle of evidence has been given in that direction.

[A'BECKETT J.—There is no finding of the jury on the question of agency. It appears that he is the manager.] We have no evidence as to the bounds of his authority as manager and I submit that it is imperative that evidence should be given that Mr. Booth was a person who had authority to accept any variation of these documents. [A'BECKETT J. I should take it that he is not an agent for that purpose.] If that be so I do not see in what aspect the company could be responsible. If Mr. Booth be not the agent for the company I cannot see in what possible way the company can be bound by anything Booth chooses to say or do. My friend feels the force of this and feels that he is bound to assume that Booth was the agent to bind the company. It remains with him to prove that Booth had authority as an agent to vary that application. In the cases of *American Insurance Company v. Mahone*, 5 Bigelow, L. I. Cas. 567 and *Jones v. The Queen Insurance Company*, 2 V.R. (L) 127 and 2 A.J.R. 69 cited by my learned friend there was no warranty but merely misrepresentation which according to the common law on those subjects is open to discussion and on all these

grounds I submit the defendants are entitled to judgment.

Mr. Higgins.—I should like to add a few words to my friend's argument. The words used are for a period of two years I will not die by my own act. I think my friend's contention is right that the object of the Company in putting the condition in, in that form, was to escape the possibility of an adverse jury finding upon the question of sanity or insanity, wilfulness or unwillingness, intention or no intention. The meaning of that claim is that the Company assures against death by all external force used by the insured against himself. The Company says if you die by your own act whether intentionally or unintentionally and whether at the time you are sane or insane we will not pay. But what the plaintiff wants to read is "I will not intentionally die by my own act" but there is nothing in the context of this policy to warrant that. I would point out that your Honor is not constrained by any of the cases cited by my friend Mr. Isaacs for in not one of those cases has the issue been found in favour of the plaintiff though no doubt there are *dicta* which tend in the direction of showing that the judges thought the act must be done with the intention of killing oneself. In *Borradaile v. Hunter* 5 M and G. 639 (the strongest case) the judge had not to face the questions we have now to deal with, viz., a case in which there was no accident but in which the man did not know the effect of his act would be death. So in *Clift v. Schwabe*, L. R. 3 C.B. 437 and *Dean v. American Mutual Life Assurance Co*, 1 Bigelow L.I. Cas. 195. All these cases still leave it open as to what is to be done in the case of a man intending to do what he did do but not knowing what the result would be. Then your Honor asked whether the Company would be liable in the case of a man taking poison when he meant to take medicine. I think the case *Cole v. The Accident Insurance Company*, 61 L.T. p. 227, clinches that point. This was a case of an Accident Insurance Company that insured against all kinds of accidents, but there was a proviso in the policy that the insured should not be entitled to recover in the case of suicide whether felonious or otherwise or in the case of death or injury from poison. The man took poison thinking it was medicine but the Court held that there was no rule making it necessary to read in the word "intentionally" in the case, and I submit that in this case your Honor is asked by the plaintiff to read in the word "intentionally."

Now as to the second point the question of the warranty and the mis-statement of the agent who received the application. The certificate is signed in New York in blank to be issued in Melbourne by agents upon certain forms being filled up. If the certificate and the application are read together they amount to this "if no propositions or negotiations or examinations with a view to assurance have been made we will pay you at your death"; that at lowest is a condition precedent. The plaintiff is suing upon this contract and claims that she is entitled to be paid under this contract although the condition precedent has never been fulfilled.

Then they say the agent Mr. Booth told the insured that question 15 was irrelevant. That may be a case of misrepresentation on the part of Booth and it is possible there might be an action against Booth for false misrepresentation but we have nothing to do with that. It is also possible that if Ballantyne had discovered the mistake before he died he could have brought an action to have the policy rectified by the alteration of his answer. Now I take it that it would be going against all the principles of giving the preference to written documents, if the evidence of what was actually said at this time were admissible where it is not an action to rectify the instrument. Ballantyne took the risk of Booth telling him accurately what was on the back of the policy and if Booth did not give him accurate information on the subject, how does that affect the company. For that purpose Booth was the agent for Ballantyne. But apart from this question the plaintiff is suing on a written contract which says the company will pay in certain events, and those events have never happened. In *The American Insurance Company v. Mahone* 5 Bigelow L.I. Cas. 567 though the word "warranty" is used throughout, it is really a case of fraudulent representation as also is the case of *Jones v. The Queen Insurance Company* 2 V.R. (L) 127. I submit for these reasons the defendant is entitled to judgment.

Mr. Isaacs in reply. The case of *Stormont v. The Waterloo Life Assurance Company* 1 F. and F. 22 rather supports the view we take. There the jury were told that what they had to consider was whether the assured threw himself out of the window voluntarily or fell out; so in this case, was it a voluntary act? Now my friend is constrained to admit that accident would, take the case out of the conditions but if my friends argument is logical he has conceded too much, for once it is admitted the literal construction of that condition is broken into, it seems to me that there is no logical reason for stopping short of the proposition we put, that is, the object of the parties and that is what has been laid down over and over again. [A'BECKETT, J.—It may be assumed that the words of the proviso have been used to secure the object of the parties.] Suppose a man gets bitten by a snake, it may be non-poisonous but thinking it poisonous he cuts off a portion of his body and in so doing cuts an artery and bleeds to death. My friend would say that his death was his own act though he actually intended to save his own life. (Dr. Madden: that would be death by snakebite.) My friend must admit that in insurance cases you must look at the *causa propinqua*. If a house is on fire and a man in his hurry to escape falls downstairs and is killed he does not die by fire but by falling downstairs.

Then my friend contends that there is a difference between a warranty and a condition. I have always understood that if a condition of a contract be broken there is an end to the contract, and in insurance cases only, is a warranty put as high as a condition. If there is a condition it must be complied with substantially and if there is a warranty it must be true and it is only when we come to the question of representation

and non-disclosure that materiality or immateriality has to be looked at. On the question of conditions, warranties and representations I would refer to the cases *Behn v. Burness* 3 B. and S. 751 *DeHahn v. Hartley* 1 T.R. 343 and 2 T.R. 186. To the alleged breach of warranty I say that it is a good plea to plead that the warranty was never given and we can say equitably and legally that it never was given. Ballantyne's mind never gave such a warranty and as to my friend saying that first of all you must bring an action to have the instrument rectified and then bring an action on the contract no attention will be paid to such a contention, as under the *Judicature Act* circuitry of action is to be avoided. The question of rectification is not raised on the pleadings but to save all trouble I ask your Honour to raise the question and allow us to amend. The case of *Foster v. Mackinnon* L.R. 4 C.P. 704 cited by my friend is a very strong case in my favour. Your Honour will see that it was an action by a third party who was no party to the fraud, and in the course of that judgment the difference between a person knowing a fact and being under a mistake as to the effect of that fact, and being under a mistake as to the fact itself is pointed out. In that case, as in this, the party did not know what he was signing, because he had been told an untruth about it; and in that case, as in this, the mere fact that he did not look at what he was signing was not negligence on his part. Therefore, I say, in contemplation of law we never gave that warranty and there was not any negligence on our part, in the face of the express statement by Booth. There is also the case of *Hunter v. Walters* 7 Ch. Ap. 75 in which the distinction is laid down very clearly. In that case the party knew that he was signing a certain document, but there was a collateral fraud. He knew he was executing a deed but it was used for a different purpose to what he believed it was going to be used for. Where a person induces another to put his name to a document under the false impression that he is signing something else, such person cannot then turn round and take advantage of his own misrepresentations. As to the case of *Anderson v. Fitzgerald* 4 H of L. Cas. 484 cited by my friend, it only goes to show that in the case of a warranty you do not look at the materiality at all and I do not dispute that. Then my friend argued that Booth was not the company's agent, but they cannot approbate and reprobate. They cannot say that Booth was their agent to effect this insurance but not their agent to do as he did with Ballantyne. He was their agent to take the proposal, to take the money, and to issue the certificate, but forsooth, he was not their agent when he incorrectly represented Ballantyne's answer. There is an American case *Insurance Company v. Wilkinson* 3 Bigelow L.I. Cas. 810 which holds that insurance companies who do business by agencies are responsible for the acts of the agent within the general scope of the business of the company and no limitation of his authority will be binding on parties with whom he deals which are not brought to their knowledge and that I submit is consistent with the doctrine of English law. When these agents in soliciting insu-

rance undertake to prepare the application of the insured or make any representation to the insured as to the character or effect of the statements in the application they will be regarded in doing so as the agents of the company and not of the insured. My friend cited a passage to show that the knowledge of the agent is not an answer, and I am not prepared to deny that the mere knowledge of the agent is an answer. Supposing for instance that Ballantyne said to Booth "My answer to that 15th question is not correct and you know it is wrong" and Booth answered "never mind, I will put it down" that undoubtedly would be a fraud by the agent upon his own principals and by Ballantyne upon the company and in that case the agent's knowledge would be no answer. But in this case the agent knows what the real question is and puts a question based upon it to the assured who does not know what the real question is. I would refer the court to *Redgrave v. Hurd*, 20 Ch. D. 1 which though a case on rescission of contract contains on p. 12 some remarks very applicable to the attempt of the defendants to set up this defence. Lastly I would refer to the case of *Cole v. The Accident Insurance Company*, 61 L.T. p. 227 cited by Mr. Higgins. In that case the Court held that as the word poison was expressly mentioned the object of the parties was plain. There are also the cases of *Filton v. The Accidental Death Insurance Company*, 17 C.B.N.S. 122 and *Trew v. The Railway Passengers' Assurance Company*, 6 H and N 839, in which the Court did not keep to the mere literal words but looked to the object of the parties. Under the head of warranties there is a case in *Porter's Insurance* p. 144 as also the case of *Thomson v. Weems* 9 Ap. Cas. at p. 681 which show that there is no distinction between stipulations and warranties. They are all warranties. *Porter* commencing at p. 144 deals with the whole question of warranty and I think your Honor will say that there is no distinction such as set up by my friend between a stipulation and a warranty.

Dr. Madden by permission of the Court. In the case of *Insurance Company v. Wilkinson*, 3 Bigelow L.I. Cas. 816 there was no warranty whatever. The company was relying upon a mere representation that had been made which they said was false and fraudulent. The answer was that they were not deceived by it because it was known to the agent. Nowhere in that case does it appear that the application was made the basis of the contract, as it was here, nor that there was any warranty whatever that the representation was true. The other case *Redgrave v. Hurd*, 20 Ch. D. 1 referred to by my friend only relates to a case of rescission of a contract. If they had brought an action to rescind this policy on the ground that the application was wrongly expressed that case might have some application. But here they want to affirm a contract and to say that the conditions upon which that contract was issued were not the conditions upon which it was issued.

Cur ad vult.

July 20.

MR. JUSTICE A'BECKETT.—This is a case in which

the defendant company resists a claim on a certificate of life assurance on two grounds. The first is that David Ballantyne in his application for insurance warranted that he would not die by his own act, and broke the warranty by shooting himself. In answer to questions sent to the jury they found that he was insane when he shot himself, and so insane as not to know that firing a gun into his own head would kill him. It is contended that on these findings Ballantyne did not die by his own act within the meaning of the warranty. In the case of *Borradaile v. Hunter*, 5 M. and G. 639, the assured drowned himself while insane, and it was necessary to determine whether he had died by his own hands within the meaning of the policy. It was held that he had, and in determining the question certain principles of construction were laid down which have been recognised in later cases as applicable to words similar to those which I have now to deal with. It was held that the meaning to be given to such words was to be ascertained by considering the object of the parties to a contract of life assurance, and the kind of danger which the insurers must be taken as intending to protect themselves against in excluding the risk of death by the hands of the assured. This danger was that the assured might take his life to enable others to gain by his death, and as this motive might operate upon an unsound as well as upon a sound mind, it was held that insurers were not to be deprived of the benefit of the condition because the assured happened to be insane when he committed suicide. "This principle of construction," it was said, "requires and accounts for the exclusion from the operation of the condition of those cases falling within the general sense of its words to which it is admitted not to apply, such as those of accident and delirium." Death resulting from taking poison in mistake for medicine, leaping from a window to escape from fire, diving into shallow water supposed to be deep would be death by the act of the assured, but not death by his own act within the meaning of the warranty if construed on this principle. In *Borradaile v. Hunter* stress was laid on the finding of the jury that the assured threw himself into the water, intending to destroy his life, and it is clear from the reasoning of the judgment that if the jury had found that he had not intended to destroy his life the decision of the Court would have been against the insurers. In the present case the jury have said that an act which could have no result but death was done without the knowledge that death would be its consequence. I should not myself have come to this conclusion, but I am bound by it, and it places the death in this case in the same category with the deaths by misadventure to which I have referred. According to the jury, no thought of death entered into the mind of the assured when he fired the fatal shot; therefore, the act could not have been prompted by any intention that others should profit by his death, and was not such an act as the defendant intended to protect itself against by the warranty contained in the application for insurance. The second defence to the action is based upon an untrue statement in the application for insurance.

In this application Ballantyne warranted that his answers to certain questions were true. One of these questions (No. 15) was in the following words:— "Has any proposition or negotiation or examination for life assurance been made in this or any other company or association on which a policy has not been issued?" and the answer was "No." As a matter of fact, Ballantyne had shortly before made a proposal for insurance to the Equitable Insurance Company of the United States, whose medical officer recommended that the proposal should be deferred. Learning this, Ballantyne wrote withdrawing the proposal before it was sent up for consideration by the directors, so that they did not consider his proposal. According to the evidence for the plaintiff, which the jury adopted as true, Ballantyne in making his proposal to the defendant company did not conceal his negotiations with the Equitable Company. Mr. Arnold, an insurance agent who had acted for Ballantyne in these negotiations, mentioned them to Mr. Booth, the Melbourne manager of the defendant company, before introducing Ballantyne as an applicant for insurance with that company. After the introduction Booth took up a form of proposal and read out the questions to Ballantyne and wrote down the answers. When he came to question 15 he read it thus;—"Have you proposed elsewhere and been declined or deferred?" to which Ballantyne answered "No, but I proposed to the Equitable, you know." Booth said "Yes, but I understand that the proposal was withdrawn and was not dealt with by the directors," to which Ballantyne answered "Yes." After the form of proposal had been filled up by Booth it was passed over to Ballantyne and signed by him. Booth gives an altogether different version of the transaction, but the jury find, in answer to questions on the subject, "That Booth, at the time of filling up the answer to question 15 knew of the proposition, negotiation, and examination which had taken place with respect to the Equitable Company. That he did not read such question or state the effect of such question to Ballantyne in such a manner as to inform him of its true purport. That Ballantyne did not know its true purport when the answer 'No' was filled up by Booth, but that he had means of informing himself of its true purport by reading it before signing the application." On these findings the plaintiff contends that the defendant company is estopped by the conduct of its manager from taking advantage of the breach of warranty as to question 15. No English authority has been cited which directly supports this contention, but the American cases of *Insurance Company v. Wilkinson*, 3 Bigelow L.I. Cas. p. 810, and *American Insurance Company v. Mahone*, 5 Bigelow, L.I. Cas. p. 567, go to the necessary length. Taking question 15 to be that read by Booth to Ballantyne:—"Have you proposed elsewhere and been declined or deferred?" Ballantyne could truly answer "No," having called attention as he did to the fact that he had withdrawn a proposal which he had intended to make to the Equitable Company. Certainly, if he had afterwards read and considered question 15 in the printed form he would have seen that "No" was not

a true answer, and then he would have been responsible if he had signed the application containing the mis-statement, out after the conversation which had occurred with reference to question 15 he might well have treated the subject as disposed of, and could not be expected to enter upon a careful scrutiny of the form of question to see that it had been properly put and properly answered. The finding of the jury altogether negatives any complicity by Ballantyne in Booth's suppression of the truth. Booth was acting within the scope of his authority in putting the questions and explaining their meaning, and Ballantyne truly answering the questions as put would not be bound under the circumstances of the present case to read the question for himself and see if his answers had been properly taken down. If the manager had warned Ballantyne not to rely upon his reading and that he would not be responsible for any mistake, the consequences would have been different, and Ballantyne would have run the risk of inaccuracy, but by the course taken he was virtually told by Booth to rely on him for having properly put the questions and written the answers. Although the assured might had he chosen have read these questions and answers before signing the application there is no evidence that he did so, and the company is not absolved from responsibility for the misrepresentation of its manager, because it might have been discovered by an investigation, which was never made. The defendant's manager, having deliberately or carelessly read a question in such a manner as to entrap the assured into an untrue answer, the defendant cannot be permitted to take advantage of the untrue answer as a breach of warranty vitiating the insurance. For these reasons I hold that the second ground of defence fails, and I direct judgment to be entered for the plaintiff for the amount of the policy.

Judgment for the plaintiff for £2,500, with costs.

Solicitor for the plaintiff *Lazarus*; solicitors for the defendant, *Lynch, McDonald, Stillman & Keep*.

IN. CHAMBERS.

(Before Webb J.)

ADCOCK v. ADCOCK AND ANOR. BERESFORD
(GARNISHEE.)

3rd August.

Rules of Supreme Court, 1884, Order XLV. r. 1—Appendix B. No. 25—Garnishee—Affidavit—The affidavit in support of a garnishee order nisi must state that the garnishee "is within the jurisdiction of the Court"—An affidavit describing the garnishee as of a place within the jurisdiction is insufficient. Application for garnishee order absolute.

In the application of the judgment creditor the garnishee was described as "a solicitor of No. 444 Collins St., Melbourne, in the Colony of Victoria."

Mr. Hayes moved the order absolute.

Mr. Shiels for the Garnishee. By section 3 of the *Supreme Court Act*, 1890, "Rules of Court" and "Rules" shall include Forms. In Appendix B. No. 25 of the Rules of the Supreme Court 1884, the form of affidavit to be used in support of a garnishee order is set out. That form requires that the affidavit should state that the garnishee "is within the jurisdiction of this Court. It is not sufficient to state as in this affidavit that the garnishee is of a certain place. He referred to *London Chartered Bank v. Webb*, 1 A.J.R. 119; *In re Rickards*, 5 A.J.R. 105; *Bailey v. Barclay*, 6 A.L.T. 66; *Rudlock v. Bates*, 10 A.L.T. 202; *Hickling v. Kelly*, 11 A.L.T. 158.

His Honor said—I am of opinion that this affidavit is decidedly defective. The garnishee is described in the affidavit as being of a place which happens to be within the jurisdiction but it is not sworn that he is within the jurisdiction. A garnishee might properly be described as of a place within the jurisdiction while at the time the affidavit was sworn he might be at some place outside the jurisdiction. The fact of the garnishee being within the jurisdiction cannot be spelled out of this affidavit. The form given in the Appendix requires that the affidavit shall state that the garnishee is *within* the jurisdiction. As this requirement has not been complied with I think the affidavit is insufficient. The order will be discharged with costs.

Solicitors: for execution creditor, *Flood*; for garnishee, *Wisewould, Gibbs & Wisewould*.

(Before Webb, J.)

ROBERTS V. BRITISH BANK OF AUSTRALASIA.

18th August.

Rules of Supreme Court 1884 Order XIV. r. 2—Order LXX. r. 1.

Where in an application for final judgment it appeared that the two clear days had not elapsed between the service of the affidavit in support and the return day of the summons as required by Order XIV. r. 2.

Held that this was an irregularity only and did not render the proceedings void and an adjournment was granted to give the defendant the required time.

Application on behalf of the plaintiff for leave to sign final judgment under Order XIV. r. 1.

Mr. Isaacs in support.

Mr. MacDevitt to oppose. There is a preliminary objection to this application. Order XIV. r. 2 provides that the application for leave to enter final judgment "shall be made by summons returnable not less than two clear days after service accompanied by a copy of the affidavit and exhibits referred to therein." The present summons which was returnable on Monday the 19th of August was served on Thursday the 13th August and the affidavit in support was not served until Saturday the 15th August. The application should therefore be refused on two grounds; 1st because the affidavit was not served along with the summons, and 2nd because two clear days had not elapsed

between the service of the affidavit and the return day of the summons.

Mr. Isaacs in reply. There has no doubt been an irregularity in this matter; but this being an irregularity only the proceedings are not void by the provisions of Order LXX. r. 1.

His Honor said:—The object of rule 2 of Order XIV. is to give the defendant two clear days in which to consider and answer the plaintiff's affidavit. These two clear days have not been given the defendant in the present case. This however is an irregularity only and can be amended by giving the defendant the necessary time. I shall therefore adjourn the summons to enable the defendant to have this time. The plaintiff to pay the costs of the day to the defendant which costs I shall fix at the hearing of the summons.

Solicitors for plaintiff, *Tuthill, Geoghegan, and Perry*; for defendant, *Pentland, Roberts and Thompson*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., Webb and Hood J.J.)

GREEN V. THE QUEEN.

June 29, 30, Aug. 4.

Police Regulation Act, 1890, sec. 4—Powers of Governor-in-Council.

The Governor-in-Council has power to dismiss or discharge any officer; this includes the legal power to permit or even to compel him, without a certificate of incapacity, to retire from the force.

Question reserved by Hood J.

(The facts appear in the judgment.)

Mr. Smythe and *Mr. Box* appeared for the Queen.

Mr. Hayes and *Mr. Cussen* appeared for the petitioner.

The CHIEF JUSTICE said:—The petitioner claims, as on the date of his petition, July 18, 1890, to be a member of the police force of Victoria of the rank of superintendent, and, as such, that he is entitled to receive from Her Majesty the sum of £2,930 10s., being the amount payable to him as salary and allowances since the 28th December, 1883, less certain amounts from time to time received by him under the name of a pension. He also claims that he is entitled to receive from Her Majesty the sum of £938, being the difference in pay between the amount payable to a first class inspector and a superintendent of police between the 21st July, 1876, and the 6th March, 1883. This latter claim has not been much pressed in argument, and it appears on the evidence that it has no foundation. The petition was heard by Hood J., without a jury. The learned judge found, as a fact, that the petitioner had been examined by two members of the medical board, and at the request of both parties he reserved for the Full Court the question whether or not, on the pleadings and the evidence, the petitioner was entitled to recover any and what amount. Power is reserved to the Full Court to draw any inference of

fact not inconsistent with the above finding. Petitioner, after an enforced resignation of his position as superintendent of police on the 31st December 1870, was re-appointed to the force as a first class inspector on September 1, 1875, and was appointed a superintendent on March 6, 1883. He neglected to obey an order directing him to proceed to a district allotted to him and after some delay he obtained leave of absence for six months on a medical certificate, certifying that such leave of absence was absolutely necessary for the petitioner's recovery. The leave expired at the end of November, 1883, and the petitioner was then directed to appear before the Police Medical Board on December 6, 1883. He attended on that day, and was examined by two out of the three members who constituted the board. These two members signed a certificate dated the same day. It states that they had examined the petitioner, and that they believed that he was incapable for the discharge of his duties as a member of the force from infirmity of the nervous system, and that they believed that such infirmity was likely to be permanent, and was not occasioned by any excess or misconduct on his part. This certificate accompanied a report of the Police Superannuation Board to the effect that the petitioner, if superannuated, was entitled to either a gratuity of £955 16s. 8. or a pension of £222 per annum. The report of the superannuation board was submitted to the Governor in Council on December 28, 1883, with a recommendation by the Minister that the petitioner be superannuated accordingly, and was approved on the same day. Previously to this, on December 10, 1883, the petitioner, on learning that the Police Medical Board had recommended his superannuation, protested by letter, addressed to the Chief Secretary, against the adoption of this course, on the ground that he had not been properly examined, and that his health would then admit of his performing his duties, and he applied for the appointment of an independent board to investigate the circumstances of his case. He renewed this protest and request in a letter addressed to the chief commissioner dated January 3, 1884, and he again, by letters addressed to the Acting Chief Secretary on January 8, 1884, and to the Chief Secretary on January 18, expressed his dissatisfaction at the course that had been taken. His request was not complied with. On August 8, 1884, he wrote to the Chief Commissioner again protesting against his superannuation, and stating that he accepted the pension to which he was entitled, £222, only because his financial circumstances compelled him to do so. From that time until the commencement of the present suit he has applied for and received payment of his pension, and has accompanied his application on each occasion with a statutory declaration that he was entitled to the sum of £18 10s., being the amount of his pension for the period of a month, and that he had not rendered himself liable to a forfeiture of pension by reason of any breach of the provisions of the "Police Regulation Statute 1873," which lays down conditions on which any pension or retiring allowance shall be liable to for-

feiture, and may be withdrawn by the Governor-in-Council. After the order of the Governor-in-Council of December 28, 1883, was made another officer of the police was appointed to the office of superintendent in the place of the petitioner, and such officer has since continued to fill the office, and has received the money voted by Parliament for and in respect of the office. The petitioner stated in evidence that he did not know on December 21, 1883, how many members were in the medical board, or how many had signed the certificate. The board consisted, in fact, of three members at that time. It must have been known to the petitioner early in January, 1884, that two members of the board only had signed the certificate, as he then received, in compliance with his request, copies of the certificate and of the Order in Council of December 28, 1883. He alleges that he first knew that two members of the board could not sign the certificate about April 8, 1890, shortly before the date of the petition. By section 36 of the statute the Police Superannuation Board is to consist of three persons. It is admitted on the pleadings that the report of this board submitted to the Governor in Council on December 28, 1883, was signed by only two members, and that only two members were present at the meeting at which the findings in the report were arrived at. It is contended that upon these facts and the terms of the statute the certificate of the Medical Board and the report of the Superannuation Board are invalid, that the order of the Governor-in-Council founded on them was null and void and wholly inoperative, and that the petitioner has in consequence never ceased to be a member of the police force of the rank of superintendent, and that he is entitled to arrears of salary and allowances as from December 28, 1883. The contract entered into by each member of the police force, both officers and constables, by virtue of taking and subscribing the oath, is a unilateral contract, and implies no corresponding obligation on the part of the Crown to retain the member in the service. (*Power v. Regina*, 4 A.J.R., 144). The contract is terminable at the pleasure of the Crown. The chief commissioner, officers, and sergeants may be suspended, reduced, discharged, or dismissed from time to time by the Governor-in-Council. Constables may at any time be discharged or dismissed by the chief commissioner, (part 1, sections 4 and 8). Part 3 deals with superannuation pensions and gratuities to which members of the force who have not been discharged or dismissed therefrom for misconduct of any kind shall be entitled on retirement or discharge from the force. By section 20 any member of the force who has served for a period of not less than 10 years, and has attained the full age of 55 years, may be superannuated, and such member shall on retirement receive at his option either a certain gratuity or a certain yearly pension. Section 21 is applicable to the case of the petitioner, who, on December 6, 1883, had not attained the full age of 55 years. It is in these terms:—

"When any member of the force has served for 10 years, and has not attained the full age of 55 years, if a certificate set forth in the second schedule, signed by the members of the

Medical Board, be forwarded to the Governor in Council by the said board, the Governor in Council may superannuate such member, and he shall thereupon be entitled to receive, at his option, the gratuity or the pension provided by the last preceding section for members of the force who have attained the full age of 55 years."

By section 38 it is provided that the Police Superannuation Board shall consider and determine and report upon all applications for gratuities and pensions, and the decision of the board, after approval of the Governor in Council, is to be final and conclusive. The provisions of these sections were not complied with in the present case by either of the boards. The certificate is a condition of the power of the Governor in Council to superannuate a member of the force, and it ought to have been signed by the members, that is to say, all the members of the Medical Board. For a similar reason the decision of the Superannuation Board should have been given and the report made by all the three persons who constituted that body. As a general rule power entrusted to a given number of individuals cannot be exercised by a less number. When an act of Parliament creates a body with certain powers, and requires that an act of that body in the exercise of its powers shall be done by the members, and no provision is made by or under the authority of the act for the exercise of the powers by a quorum, or by part only of the whole number of the members, the act in order to be valid must be done by all the members of the body. (*Foran v. Regina*, 16 V.L.R., 510). But assuming that in the present case the certificate and the report of the two boards respectively were invalid, and that the allowance of a pension to the petitioner was *ultra vires* of the Governor in Council, it does not necessarily follow, as the petitioner contends, that he has continued to be and still is a member of the police force. This is a question of fact. The Governor in Council had power to discharge or dismiss the petitioner, and that included the legal power to permit or even to compel him, without a certificate of incapacity, to retire from the force. It is clear that such leave to retire was intended to be given and was given to the petitioner by the Order in Council. It is an inference of fact equally clear, in our opinion, that the petitioner, unwillingly, indeed, and under protest, acted upon that leave, and did in fact retire from the force. His first application for payment of the pension, which could only be legally paid to an officer who had retired, coupled with the statutory declaration that he was entitled to the pension, is proof of the fact of his retirement. The fact of actual retirement stands, although the petitioner's admission of the fact and his subsequent receipt of the pension might possibly, at a different time, or under different circumstances from the present, or in connection with a question different from that which we have now to determine, be capable of being explained and their effect got rid of by proof of his ignorance of facts, not of law, sufficient to show that notwithstanding his retirement he had a just claim for relief of some kind. But these considerations are foreign to the subject of the present inquiry.

We find as a fact that the petitioner did retire from the police force of Victoria, and that he is not now a member of the force of the rank of superintendent. This finding disposes completely of the petitioner's claim as it is presented in this petition. In dealing upon this single ground with the question referred to us we must not be considered to intimate an opinion that the petitioner had established upon the facts disclosed in this case any meritorious cause of action or claim for relief, legal or equitable, against the Crown, or the chief commissioner, or the members of the Medical Board, or the Police Superannuation Board, or anyone. Our answer to the question referred to us is, that on the pleadings and the evidence the petitioner is not entitled to recover any amount.

Solicitors for the petitioner, *Osborn*; for respondent, *Crown Solicitor*.

(Before Higinbotham, C.J., a'Beckett, and Molesworth, J.J.)

ADKINS v. KILPATRICK.

10, 11 August.

Health Act 1890 s. 234—Notice—Plans—In a notice and under s. 234 it was stated as follows:— "street is to be formed etc, according to the levels and specifications approved by the said council, and detailed, shown and set forth in the plans and documents hereunto annexed; counterparts of such plans and documents can be inspected at the office of the town clerk of the said council in the town hall of the said city." *The annexed plan did not specify the longitudinal sections without a specification of which the work could not be done.*

Held that the notice was defective.

Order to review an order of justices at St. Kilda, wherein Thomas Kilpatrick, on the information of Alfred Adkins, an inspector of the local board of health, was fined £1 per day for 48 days. The proceedings in the Court below had been instituted under section 234 of the *Health Act 1890*. An order had been made by the local board of health, directing the formation of a certain street within their district; Kilpatrick had failed to comply with this order; it was notified in the order addressed to Kilpatrick and the others, that the street in question was to be formed etc, "according to the levels and specifications approved by the said council, and detailed, shown and set forth in the plans, and documents hereunto annexed" and it was added that counterparts of such plans and documents could be inspected at the office of the town clerk of the said council, in the town hall of the said city. A plan was endorsed on this notification, not including the levels of the street, and evidence was given before the justices by an expert that there was no longitudinal section upon the plan, and that it would be impossible to do the work under the plan as shown. The order to review had been obtained on the ground (*inter alia*) that the plans endorsed on the notice to form the street were insuffi-

cient as there was no longitudinal section supplied.

Mr. Isaacs (with him *Dr. Madden*) appeared to move the order absolute.

Mr. Mitchell (with him *Mr. Higgins*) showed cause; It is submitted that the plan endorsed is sufficient for the purposes of the notice; even if it were not, the defendant is informed that he can obtain all the information he requires at the town hall; that intimation, in itself, is sufficient. *Local Board of Health for Fitzroy v. Howell* 8 V.L.R. (L) 6; the court should not be astute to discover some technical defect in the notice, and thereby defeat the statute.

Mr. Isaacs, in reply:—No levels are specified in the notice; that is a fatal defect; *Woolcott v. Richmond Local Board of Health*, 2 V.R. (L) 153, the absence of the longitudinal sections renders the work impossible, the defendant was entitled to assume that the "counterparts" at the town hall were equally defective; therefore, *Woolcott's case* does not apply, the section is penal and to be construed strictly.

HIGINBOTHAM, C.J.—This is a question raised upon an order to review the decision of justices of the Court of Petty Sessions, St. Kilda, by which they ordered the defendant to pay to the complainant £48 within 14 days, or in default the amount to be recovered by distress. Proceedings were taken by a health inspector against one of a number of property-holders who were called upon, under section 234 of the Health Act 1890, to "form, pave, level, and drain" a certain street. This section is a very important section of a very important act. This section is, I will not say harsh but severe upon those who are called upon to do the duties cast by it upon them. I agree as has been argued by counsel that the law in this section contemplates a substantial compliance with the provisions of it, and that we are not to seek for some technical defect so as to defeat the section. On the other hand, it is the duty of local bodies to use the greatest care and attention before issuing an order under this section, so as to inconvenience as little as possible those who have to carry out the provisions of this section. The local body must fix the levels of the street to be made, and must communicate these levels to the person who has to make them, so the time within which the work is to be done is fixed, and a reasonable time must be given. In this case the order was addressed to the defendant and 13 other persons to form, pave, level, drain, and make good a certain private street known as Moy-street, and it was notified to these persons that this work was to be done "according to the levels and specifications approved by the said council, and detailed, shown, and set forth in the plans and documents hereunto annexed; counterparts of such plans and documents can be inspected at the office of the town clerk of the said council in the town hall of the said city." A plan is endorsed upon this notice, not including the levels of this street that is to be made, and evidence was given before the justices by a skilled witness that there was no longitudinal section upon the plan, and that it would be impossible to do the work under this plan as shown. The defendant neglected to do this work, and neglected to avail him-

self of the invitation to go and see the counterpart of the plan, and we think that he was not compelled to go and inspect this counterpart. The notice calling upon him to go and inspect the counterpart at the office of the town-hall was deceptive as it would lead him to believe that that counterpart was identical with the plan on the back of the notice served upon him. No doubt if he had gone to the town-hall he could have, by searching, procured the information necessary to have enabled him to carry out this work. We do not think that there was any duty cast upon him to go and search for this information. Extending every latitude to a council engaged in carrying out a difficult law, we think that a person who is subject to the penal provisions of this section may claim all the conditions and information, or the means of obtaining them, upon which the work is to be performed. We think, therefore, that the defendant was justified in refusing to obey, and that the order of the justices founded upon the alleged breach of this order was wrong, and upon this ground the order of the justices cannot stand. The order to review will be made absolute and the appeal allowed with costs, and the order below will be set aside.

Solicitors: for Local board of Health, *Woolf & Destree*; for defendant, *Herald*.

(Before Higinbotham, C.J., a'Beckett and Molesworth, J.J.)

THE QUEEN v. McMAHON.

August 13.

Crimes Act 1890 s. 54—Bigamy—Knowledge of accused—Evidence.

Statements made in the accused's presence by accused's first wife prior to the second marriage to the effect that she had been married to a man still living at the time of her marriage with the accused, are evidence on behalf of the accused.

Case stated by a'Becket, J.

(The facts appear in the judgment).

Sir Bryan O'Loughlen appeared for the accused.

Mr. Leon for the Crown.

The question in this case is raised on a case reserved by the learned judge and an addendum on that case also authorised by the learned judge. It was a trial in which the accused Thomas McMahon was charged with the offence of bigamy. It appeared that he had been married to Mary Kate Josephine Hughes in February 1880, and in August 1887 he went through the ceremony of marriage with Helen Makepeace. In the course of the case, counsel for the prisoner proposed to prove some statement made by the first wife, who had been known as Mrs. Cresse as well as Mrs. McMahon, that she was married to a man named Cresse, and that he (Cresse) was living after her marriage with the prisoner. It is not clear in the case as originally stated, or, from the addendum how far these proposed statements of evidence were defined at the time the learned judge was asked to reject this evidence, but we think

it may be inferred from the addendum to the case that the learned judge made a ruling rejecting the evidence which the accused intended to call and which went to show that before the second marriage a statement had been made to him by the first alleged wife, Mrs. Cresse, from which he might infer that she had a husband living at the time of his marriage to her, and consequently that his marriage with her was no marriage at all. If that evidence had gone to show that the statement had been made before the second marriage of the prisoner and in his presence, that would have been evidence relevant to the present charge which involved knowledge or intent on the part of the accused, knowledge or intent is an element of the evidence of bigamy, both under the general principle of the law and also by reason of the proviso to the section of the Statute which provides the punishment for the offence of bigamy; and if in an offence like this involving as an element of the offence, knowledge or intent on the part of the accused, evidence can be given to him which goes to show that his intent was innocent, or that he was ignorant of the facts necessary to constitute his committing the offence, that evidence is admissible. We think, therefore, that, in this case, the result of the objection taken by the Crown has been to exclude evidence which would have been admissible if tendered by the accused. The conviction, consequently, cannot be allowed to stand. The learned judge who tried the case and who is in a better position than the other members of the Court can be to judge generally of the case, advises us that, in his opinion, it is not necessary or expedient that a second trial should be ordered, and in deference to that opinion no new trial will be ordered.

Solicitors: for accused, *McKean & Leonard*; for Crown, *Crown Solicitor*.

IN CHAMBERS.

(Hodges, J.)

McMECKAN v. AITKEN AND ANOTHER.

June 6th,

Rules of the Supreme Court 1884 Order XXXI. r. 11—Interrogatories—Further answers—Servants or Agents—The party interrogating can only require the interrogated party to make inquiries from his servants or agents as to what his servants or agents know or did in the ordinary course of their employment

Application on behalf of the plaintiff for further and better answers to interrogatories. The plaintiff had instituted an action against the defendants as executors of the will of James McMeckan, seeking to have probate of that will revoked, on the grounds that at the time James McMeckan had made the will he had not a testamentary capacity and that the will was executed under undue influence. The plaintiff administered the following interrogatories:—

1. Did James McMeckan, the testator, suffer from

any physical or mental ailment during the years 1884 to 1890 inclusive? If yea, state specifically the nature of such ailment, the duration of such attack, and whether the testator was under the treatment of any, and if any, what medical man for such ailment?

2. Did the testator, or any person on his behalf, give any and what instructions for the will in question in this suit? State specifically when, where, to whom, by whom, and in what manner and in whose presence such instructions were given, and if such instructions were in writing, state in whose writing they are and whether or not the testator signed such instructions, and in whose custody such instructions now are and have been since they were given.

There were other interrogatories, but they are not material for this report. To the 1st interrogatory the defendants, after stating their own knowledge as to the matters inquired, stated "we object and submit that we are not bound to state the name or names of any medical man or men under whose treatment he was, because the plaintiff is not entitled to ask for such information, and we do not know, of our own knowledge or from information, whether, during the years 1884 to the time of his said illness in March, 1888; the testator suffered from any bodily ailment or was under the treatment of any medical man or men..... save as aforesaid, we are unable to answer said interrogatory from our knowledge or from any information received by us." "As to the second interrogatory, I, the said James Aitken, say that I was requested by the testator at some time after he had recovered from his illness in March, 1888, and before June, 1888, but at what time I am unable to state more precisely, to call at the office of Messrs. Klingender, Dickson, and Kiddle, solicitors, and inform Mr. Klingender, or some member of the said firm, that he, the testator, desired to make his will, and we say, although we have no doubt in our own minds that the testator gave instructions to Mr. Klingender for the will in question, yet we do not know of our own knowledge or from information given to us by Mr. Klingender, the testator, or any other person to whom the testator gave instructions for the said will, or by whom, in what manner, and in whose presence such instructions were given, or whether they were in writing, or in whose custody they now are or have at any time been, and save as aforesaid we are unable, from our own knowledge or from information received by us, to answer the said interrogatory, and we submit that we are not obliged to apply to our solicitors for information respecting the matters referred to in this and the following interrogatory, inasmuch as if we had received any information from our solicitors it would be privileged. The attorney for the plaintiff in support of the summons. The defendants have the means of obtaining all the requisite information from the medical man who attended the testator, and they should at all events endeavour to obtain that information. The information is at their disposal, and they should be compelled to give it. The medical man has his fees paid by the defendants, and is in the position of their agent, and this knowledge is their knowledge. As to

the answer to the second interrogatory there is no privilege; Mr. Klingender did not get the instructions while he was their solicitor: *Foakes v. Webb* (28 Ch. D. 287); *Crawcour v. Salter* (18 Ch. D. 30). This interrogatory is directed to matter which go to the material question in dispute, and it is information which it is absolutely necessary to bring before the court in order to enable the court to decide the matters in issue. The defendants have made no endeavour to obtain this information, and as it is in their power to obtain it they should be compelled to give it.

Mr. J. Dennistoun Wood to oppose. The medical man is not and was not the agent of the defendants, and they have no power to compel the medical man to give the information; he does not stand in the position of an agent or servant; *Bolckow v. Fisher* (10 Q.B.D. s. 167); *Rasbotham v. Shropshire Union Railway Co.* (24 Ch. D. 110.) Mr. Klingender was not the agent of the defendants, he was the solicitor for the testator at that time, and it is only a chance that he happens to be their solicitor; the defendants have no means of compelling Mr. Klingender to give them the information. The defendants are only bound to give their own knowledge. With reference to the answer to the second interrogatory, anything that the defendants' solicitor communicates to them for the purpose of this litigation is privileged; *Lawrence v. Campbell* (4 Drew 485), *Minet v. Morgan* (L.R. 11 Eq. 284).

Cur ad Vult.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day said:—The matters in dispute between the parties in this case are whether the deceased, at the time he made his will, had a testamentary capacity, and whether he was at that time subject to undue influence. The plaintiff has interrogated the defendants, first as to the bodily and mental ailments of the deceased between certain dates and particularly as to his mental condition in March, 1888. The defendants have answered that, as far as they have knowledge; and on that interrogatory the question arises whether they are bound to go further and make enquiries of the doctor who attended the deceased as to what was his mental condition at the time he attended him when he had been seized by a fit. The only objection raised to the answer by the plaintiff is that the executors have not stated what was the nature of the fit which the deceased had, and that if they did not know of their own knowledge, the doctor would know, and that they are bound to apply to the doctor. Now it is not disputed that a person is entitled to ask the opposite party all facts that are material to the matters in dispute between them and he is entitled to have that answer to the full extent of such party's knowledge, and the only doubt is as to how much further the plaintiff can go and require the defendant to answer not only as to his own knowledge, but to make enquiries from other persons. It has been held that the person interrogated must state the information of his servants and agents. The doctor here was neither the executors' servant or agent, and the question

is, can the interrogated party be required to go further than to make enquiries from his servants and agents only. The principle, in my opinion, upon which these cases have been decided requiring the interrogated person to make enquiries from his servants or agents, is, that the act of the agent is the act of the principal, and that the knowledge of the agent is the knowledge of the principal. That is the reason why the principal is bound to enquire of his agent. I think that this is shown clearly by the fact that if the agent acquires the knowledge in any other way than in the course of his agency, and if the act is not an act done by him in the course of his agency the principal will not be required to get the information from his agent. In the case of *Anderson v. Bank of British Columbia* (2 Ch. D. 644), James L. J. at p. 657 says, "A man makes a claim against a Bank in London; the bank in London not having all the facts in their knowledge, send out to their agent who transacted the business, a telegram to this effect 'give us the fullest information that you have of all the facts and circumstances of the case, all about the shipping document' and everything of the kind connected with it.' That is exactly what they ought to do. It is the duty of a man in the ordinary course of business to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is or ought to be the knowledge of the principal; and even if after the bill had been filed the defendant had said when asked for discovery, 'I do not know, all the knowledge is in the possession of my agent in Oregon,' this court would say 'that is no answer; it is your duty in making the discovery to use your best efforts *bona fide* to obtain all the information that your agent can give you, and, whether it is before or after litigation you ought to write to him if necessary and get from him the information.' The important part of that judgment is "it is the information of the agent, and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is or ought to be the knowledge of the principal." In the same case at page 659 Mellish L. J., speaking of the relation between principal and agent, says "that is information respecting matters which in point of law are the acts of the principal himself, and it is information respecting matters as to which the knowledge of the agent is the knowledge of the principal. In point of law the principal is to be deemed to have known the facts before he has actually got personal information about them. I cannot but think that, as you are entitled to ask the principal what he knows respecting those facts, you must necessarily be entitled to the information which the agent has sent respecting them." In the case of *Bolckow v. Fisher* (10 Q. B. D. 161), Brett, L. J., at pp. 168, 169, says: "The question is whether the answer which has been given to certain interrogatories in this case is or is not sufficient; the interrogatories not having been objected to, and being admitted to be

proper ones, the defendants, it is contended, are not bound further to answer because, in order to give such further answer, they must make certain inquiries of their servants or agents, and it is argued they are not bound to do so, and that it is sufficient for them to say that they were not personally present when the acts inquired into were or were not done, but that their servants or agents were. In my opinion, that of itself is no excuse for not answering. In my opinion, a party is not excused from answering with regard to certain acts by saying that he himself was not present when those acts might have been done, but his servants or agents were, if those acts were such as in the ordinary course of business would be done by or be known to his servants or agents. I think, however, that he would not be bound to answer as to that which was only known to his servants or agents accidentally, and not in the ordinary course of business." Lindley, L. J., at p. 171, says: "It seems to me that where a party is interrogated as to matters done or omitted to be done by his agents or servants in the course of their employment, he does not sufficiently answer by saying that he does not know and that he has no information of the subject. He is bound to go further and obtain information from such agents or servants of his, or he must show some sufficient reason for not doing it." Now those cases in my opinion clearly settle this, that you can only require the interrogated party to make inquiries from his servants or agents as to what his servants or agents know or did in the ordinary course of their employment. In this case, the doctor was undoubtedly neither the servant or agent of the interrogated party, and was not acting as such servant or agent. Consequently, in my opinion, the plaintiff cannot require the executor to go to the doctor and find out anything from him. The second interrogatory asks what took place when the instructions for the will were given. The defendants have answered all they know of this, and say that they cannot be required to answer further, and it is on this answer that they have raised the question of privilege. Now, the question in this case being as to whether the deceased had a testamentary capacity at the time he made the will and as to whether he was at that time subject to undue influence, the most important materials which can be submitted to the tribunal which will have to deal with this case, to enable it to arrive at a decision on the matter, no doubt will be, I think, what was said and done by the testator at and about the time he was giving instructions for the will, and I have not the slightest doubt that there is as to that no privilege whatsoever, and that so far as the question of privilege is concerned the plaintiff would be entitled to get that information; but it happens that the defendants themselves have not got this information, and then the question arises which was involved in the consideration of the first answer, and that is, can they be compelled to go and make inquiries of other persons who were not their agents in order to enable them to further answer the question. Assuming for the moment that Mr. Klingender was the solicitor

who acted for McMeckan in drawing up the will, Mr. Klingender was not the solicitor of the present defendants; he was not doing anything under their instruction, and as he was neither an agent or servant of theirs I do not see how the present defendants can be required to go and ask him as to what took place at that time. He would be under no obligation to tell them by reason of his having been simply the solicitor of McMeckan, and they would have no power to force him to tell them. The fact that Mr. Klingender happens also to be the solicitor of the defendants in this suit makes no difference, it does not make what he did when he was not their solicitor, the acts of their servant or agent. There are three other interrogatories asked as to when the testator executed the will and who were present at such execution and in whose custody the will has since been. The defendants have answered these as far as they have any knowledge of themselves. There is no question of privilege raised with regard to these interrogatories, but although there is no question of privilege raised the answer is as complete as the defendants can be compelled to make. The same answer will be given to the 4th, 5th, and 6th interrogatories. The question of privilege has nothing to do with the matter at all, but the defendants cannot be required to go to a person who was not their servant or agent to obtain further information. The summons will be dismissed with £3 3s. 0d. costs.

Solicitor for Plaintiff.—Herald.

Solicitor for Defendants.—Klingender, Dickson, and Kiddle.

(Coram Hodges, J.)

IN RE STREET AND COY. LIMITED.

EX PTE. C. R. PARSONS.

24th and 25th June.

Companies Act 1890 (No. 1074) sec. 93—List of contributories—Where the Memorandum of Association authorises shares to be issued at a discount and can be so issued, and any person taking such shares is not liable to pay anything on them.

Application on behalf of the official liquidator to settle the list of contributories. It was sought to place C. R. Parsons and others on the list of contributories. The facts appear sufficiently from the judgment.

Mr. Bryant for the official liquidator in support cited *Brown's case* 19 Beav. 97; *In re Almada and Tirito Coy.* 38 ch. D., 415.

Dr. Madden for C. R. Parsons to oppose cited *Baron de Beville's case*, L.R. 7 Eq. 11; *In re Dagland Hall Colliery Coy.* L.R. 5 Ch. Ap. 346; *Waterhouse v. Jamieson*, L.R. 2 Sc. ap. 29.

His Honor said I will consider the matter.

His Honor on the following day said:—This was an application on behalf of the official liquidator to settle

the list of contributories in Street and Company Limited which is being wound up. Mr. Charles Robert Parsons has been placed on the list of contributories in respect of 1000 contributory and 4000 shares which are described in the register as fully paid up. It is not disputed that he should be placed on the list of contributories in respect of the 1000 shares but it contended that he ought not to remain on the list in respect of these 4000 shares. The question I have to determine therefore is whether or not he should remain on the list in respect of these 4000 shares. He is on the register of the company as holder of these 4000 paid up shares for which he gave and the company received nothing. For the purposes of this judgment I assume that he agreed to take and did take these 4000 shares. By what I may call clause IV of the memorandum of association it is provided that "The capital of the company is £50,000 in 50,000 shares of £1 each; 3,400 of which are contributing shares and 16000 fully paid up and upon which no calls shall be payable"; so that if one looks at the memorandum alone to see what contract the person who takes these shares makes with the company, it is clear, I think, that the company allots the shares to a person and that person accepts the allotment without any obligation to pay any money or calls on them; and if the contract be a valid one such person would not be liable to pay anything to enable the company to meet its liabilities. It is said on behalf of the liquidator that the person taking these paid up shares is liable on them because the capital of the company is described in the memorandum of association as being £50000 and the effect of freeing holders of paid up shares from liability on them would make the capital of the company £34,000 only. I do not think I am justified in taking part one of the clause in the memorandum. I think, I must read the clause as a whole and reading it as a whole the capital of the company is substantially £34000. Certainly, whatever, be the real capital of the company the clause stating what the capital is states that there are to be 16,000 shares fully paid up and upon which no call can be made. I have no doubt, whatever, that the meaning of the contract is that a shareholder who takes these shares is to be under no liability in respect to them. It is argued that even if that be so as between a shareholder and the company yet the contract is illegal as regards third parties and the shares are to be treated as not paid up at all. Reliance was placed on *In re Almada and Tirito Company* 38 ch. D. 415. That case decided that a company limited by shares under the Act of 1862 has no power to issue shares at a discount so as to render the shareholder liable for a smaller sum than that fixed for the value of the shares by the memorandum of association; and such issue will be invalid although the contract with the shareholder under which the shares were issued has been registered under section 25 of *The Companies Act 1867*. This case does not govern the present case for it merely decides that the articles of association cannot justify departure from the memorandum of association; but it is no authority for the proposition that if the memor-

andum authorises shares to be issued at a discount they could not be so issued, and no authority for the proposition that any person taking these shares described in the memorandum (not the articles), as fully paid up, is liable to pay anything on them. Is there anything in the *Companies Act 1890* which makes such a shareholder liable in the winding up for what he has not agreed to as between himself and the company? I do not find anything in the Act which imposes such a liability on him. I can find abundant support for the decision *In re Almada and Tirito Company* case; but I cannot find anything in the Act which says that a shareholder, who makes a contract with the directors of a Company which the Directors are authorised by the memorandum and articles to make, should be saddled with any liability other than that which the contract he has made imposes on him. I am therefore of opinion that these shares must be treated as fully paid up shares and that Mr. Parsons name is wrongly on the list of contributories in respect of these paid up shares. I do not feel disposed to give any costs. There was a great dispute as to whether Mr. Parsons agreed to take the shares. I have no doubt he agreed to take them, but I have great doubt as to whether they were validly allotted and as to whether the process of allotment was properly gone through at any meeting of directors I have no doubt he knew of their being placed in his name; he certainly knew that in February, and as he denied having taken the shares regularly or irregularly I give no costs.

Solicitors, *Eggleston Derham and Martin* for official liquidator; *Klingender, Dickson and Kiddle* for C. R. Parsons.

(Before Webb, J.)

SUTTON V. SAUTTER.

24th August.

Rules of Supreme Court 1884 Order XIV. r. 1—Order LIV. r. 4—Notwithstanding Order LIV. r. 4* the time for delivering a defence does not run between the time of the taking out and the hearing of a summons for final judgment under Order XIV.*

Application on behalf of the defendant for an order that the judgment entered for the plaintiff be set aside.

It appeared that on 12th August the defendant's time for delivering a defence to the writ which was specially endorsed had elapsed. On the 12th August the plaintiff served a summons for final judgment under Order XIV. r. 1, such summons being returnable on the 17th August. The plaintiff on the 14th August signed judgment as for default in delivery of a defence.

Mr. Duffy in support The time for delivering a defence does not run between the time of the taking out and the hearing of a summons for final judgment under Order XIV. *Hobson v. Monks* W.N. (1884)8; and therefore the plaintiff should not have signed judgment as on a default pending the hearing of the summons for judgment.

Mr. Anderson to oppose. Order LIV. r. 4* provides that "Every summons . . . shall operate as a stay of proceedings from the hour at which it is attendable. Provided that it shall be lawful for any judge, if under special circumstances he shall see fit, to order that any such summons operate as a stay of proceedings from the time of service." This rule is not in English Rules under which *Hobson v. Monks* was decided, and under the Victorian rule it is evident that the summons could operate as a stay of proceedings only from its return day.

HIS HONOR said:—This question has been decided in the case of *Hobson v. Monks*. In that case Pearson, J., says: "It seems to me that it would be an absurdity to hold that the defendant must put in a defence when the plaintiff is asking for final judgment on the ground that there is no defence. What is the use of the defendant's delivering a defence while the question is pending whether he is to be allowed to defend. My strong opinion is, that when a summons is taken out under Order XIV., the defendant ought not to put in a defence." With these remarks I entirely concur. I therefore order the judgment to be set aside with L3 3s. costs. I certify for counsel.

Solicitors, for plaintiff, *Evans and Masters*; for defendant, *Coburn*.

(Before Webb, J.)

THE CITY NEWSPAPER COMPANY LIMITED & ANOTHER
v. THE EVENING STANDARD NEWSPAPER COMPANY
LIMITED AND OTHERS.

August 24th.

Rules of Supreme Court 1884 Order XXXI. r. 11—

Interrogatories—The party interrogating is entitled to have a distinct statement on the face of the answer that the party interrogated has made inquiries from his servants or agents, and that after such inquiries he is unable to answer as to his knowledge information, or belief.

Application on behalf of the defendants for further and better answers to interrogatories. The plaintiffs had instituted an action claiming specific performance of an agreement for the sale of the *Standard* newspaper to the plaintiffs. Interrogatories were administered by the defendants for the examination of James McKinley one of plaintiffs and Duncan Logan the secretary of the plaintiffs. The 7th interrogatory was as follows:—"7. When and how did you respectively and when and how did the defendant company by any and if so which of its officers or servants hear or receive any information that the defendant company repudiated the said agreement?" To this the plaintiffs put in the following answer: "7. To the 7th interrogatory we say that we never received any information that the defendant company repudiated the said agreement except by the omission and neglect of the defendant company to reply to a letter dated the 7th Feb. 1891, and written by the deponent D. M. Logan on behalf of the plaintiff company nominating an assessor in pursuance of

the said agreement save as aforesaid we are unable to answer the said interrogatory from knowledge, information, or belief." There were other interrogatories and answers which were the subject-matter of the argument but they are not material to this report.

Mr. Higgins in support of the summons. The interrogatory refers specifically to other officers and servants and it was the duty of the deponents to answer according to the information and knowledge of such other officers. A person interrogated is bound to obtain the knowledge and information of his servant or agent and it is consistent with this answer that the plaintiffs never sought the information from any of the other officers or servants. The defendants are entitled to have the fact stated on the face of the answer that the information afforded is that of all the officers and that inquiries have been made of all the officers.

Mr. Hayes to oppose. The plaintiffs did not specifically ask for the knowledge and information of the other officers. It is to be presumed too that the information afforded is that which has been obtained after making the requisite inquiries, the usual form of answering has been adopted and there is no precedent for setting out in the answer the fact that due inquiries have been made. Counsel referred to the following cases, *Attorney General v. Rees* (12 Beav. 50) *Southwark Water Coy v. Quick* (3 Q. B. D. p. 321).

Mr. Higgins in reply referred to *Bray, on Discovery*, pp. 75, 141, *Rasbotham v. Shropshire Union Railways and Canal Coy.* 24, Ch. D. 110; *McIntosh v. Great Western Railway Co.*, 4 D. and S. 544; *Bolckow v. Fisher*, (10 Q. B. D. 161).

HIS HONOR said:—The plaintiff objects to answer three interrogatories. [His Honor read the seventh interrogatory and the answer thereto.] It is objected to that answer that when a company by its secretary is interrogated which is the case here, it is not sufficient to answer as to knowledge, information or belief, but that it must allege that the party answering has inquired of the officer of the company who might be able to give information and has been unable to get information. The question is whether that should appear on the face of the answer. There is no doubt whatever that a company interrogated through its secretary or manager is bound to inquire of other officers who may be able to give information of the matter of which discovery is sought. Is it then to be assumed when the secretary says that he cannot answer from information that he has made those inquiries? In my opinion the parties are entitled to have a distinct statement of the inquiries having been made on the answers and then a statement that the party interrogated after those inquiries, is unable to answer as to his knowledge, information, or belief. The case of *McIntosh v. Great Western Railway Coy.* (4 De. G. and S. 544) goes to that extent and *Bray* in his book on Discovery speaks of it as a moot point and there seems to be no distinct judgment upon the point. If the matter were *res integra* I think that the party interrogating is entitled to have the statement on the face of the answer in order that he may

know that the parties have taken steps to have the information obtained. (His Honor then dealt with the remaining interrogatories and answers which are not material to this report).

Solicitors for plaintiffs, *Haden Smith, Terry & James*; solicitors for defendants, *Woolf & Destree*.

SUPREME COURT SITTINGS.

(Before Hodges, J.)

SPALDING AND OTHERS V. BAILEY.

July, 16.

A obtained two judgments against B. in the New South Wales Courts. Shortly after B's estate was sequestrated and A proved for the amount of his judgments upon B's estate. Subsequently A brought an action in the Supreme Court of Victoria on these two judgments.

Held, that as all persons were prohibited by the law of New South Wales from bringing actions against an insolvent and as New South Wales was the forum of the obligation therefore the debtor could not be sued here.

The plaintiffs by specially endorsed writ claimed £123 15s. 9s., being the amount recovered by the plaintiffs against the defendant under a judgment of the Supreme Court of the colony of New South Wales and under a judgment of the Metropolitan and Hunter's District Court of New South Wales, dated respectively the 12th day of April, 1887, and the 7th of April, 1887.

Particulars.—Amount recovered by the plaintiffs against the defendants under judgment of Supreme Court of New South Wales, dated 12th April, 1887, £53 14s. 10d.

Amount of taxed costs recovered by the plaintiffs against the defendant under said judgment, £49 10s. 11d.

Amount recovered by the plaintiff against the defendant in the Metropolitan and Hunter's District Court, holden at Sydney in New South Wales, £18 19s. 10d.

Amount of costs recovered by the plaintiff against the defendant under said judgment, £1 10s. 2d.

Total, £123 15s. 9d.

The defence stated:—(1.) That the defendant did not admit any of the allegations of fact contained in the statements of claim. (2.) In the alternative the defendant said that even if the said judgments were obtained against him as alleged, which he did not admit, he became insolvent under the meaning of the Statutes in force concerning insolvents in the colony of New South Wales and the plaintiffs proved for the respective amounts of their alleged claims on the estate of the defendant and that the alleged cause of action in the statement of claim mentioned, accrued, if at all, which he does not admit before the defendant so became insolvent.

The reply:—(1.) Joined issue; and (2.) plaintiffs objected that paragraph 2 of the defence, even if true, afforded no answer to the plaintiffs' claim, inasmuch as no facts were alleged which showed either a discharge of the claims or demands sued for, or that the plaintiffs were in any way prevented from enforcing those claims or demands in this action.

The following facts were admitted at the trial:—By the defendant: (1.) That the plaintiffs did, on or about the 7th day of April, 1887, obtain in the Metropolitan and Hunter's District Court, holden at Sydney, judgment against the defendant for the sum of £18 19s. 10d. and £1 10s. 2d. for taxed costs amounting together to the sum of £20 10s.

(2.) That the plaintiffs did, on the 12th day of April, 1887, obtain in the Supreme Court of New South Wales judgment against the defendant for the sum of £53 14s. 10d. for debt and £49 10s. 11d. for taxed costs, making together the sum of £103 5s. 9d.

(3.) That the two said several judgments still remain unpaid.

By the plaintiffs:—That subsequent to the dates of the judgments recovered against the defendant by the plaintiffs the estate of the defendant was compulsory sequestrated in the colony of New South Wales on the 15th day of April, 1887, in accordance with the laws relating to insolvency in the said colony, and the plaintiff proved upon the estate of the defendant for the amounts of the judgments now sought to be recovered in this action.

Mr. Mitchell for the plaintiffs.—The facts are all admitted and what the Court has to consider is a pure question of law, viz., can the plaintiffs maintain this action notwithstanding that the defendant's estate has been compulsorily sequestrated in New South Wales, and the plaintiffs have proved thereon for the debt the subject matter of this action. I submit the defendant will have to show that the insolvency discharges him from the debt. *Jones v. Hill*, L.R. 5, Q. B. 230.

[*Hodges, J.*—What about those sections in the New South Wales Act that stop all actions upon the insolvency of the insolvent.]

Those sections merely say "stay" all actions, and the same class of sections appear in the English Act. If your Honor would look at the New South Wales Act, 5 Vict., No. 17, s. 97, your Honour will see what is the effect of a discharge. I would also refer the Court to *Ellis v. McHenry*, L.R. 6, C.P., at pp. 228, 234; and *The National Bank v. Plummer*, 6 W.W. and A.B. (L.), at p. 167. Before the Judicature Act this defence might possibly have been allowed as a plea in abatement. Bullen and Leake 4th edition, vol. II, p. 24. The Court will not allow such a defence as a matter of course; the defendant must show very good reasons why it should be allowed.

Mr. Cussen, for the defendant.—The defendant relies on two points. First, that he is discharged by the plaintiffs having proved on the estate for their debt; and, secondly, the plaintiffs by proving on the estate have elected to recover in that way, and are therefore stopped from proceeding in this action. 5 Vict., No.

17, s. 30 makes a judgment debt provable in insolvency, and section 31 provides that no action shall be brought.

The general principle is laid down in *Story's Conflict of Laws*, 8th Edition, 381. The real point is, would this be a good defence in New South Wales, and I submit on sec. 31 of 5 Vict., No. 17, it would. I would refer the Court to *Quelin v. Moisson*, 1 Knapp at p. 265, referred to in note on *Edwards v. Ronald*, a case on all fours with this case. The discharge of an insolvent under his own special forum is a discharge in the English Court, *Westlake's International Law*, sec. 225. Secondly, I submit that the plaintiffs having elected to be satisfied with the dividend they would get by proving on the estate, they are estopped from maintaining this action. *Phillips v. Allen*, 8 B and Cra. 477, and at p.p. 484, 485.

[HODGES, Judge.—That case seems to me only to show that if the defendant is discharged in New South Wales he is discharged here] I would also refer the Court to *Glass v. Keogh*, 4 W.W. and A.B. (L.) 192, and to *Ex parte Roberts*, L.R. 20 Eq Cas., 783. On these grounds, and especially on the case of *Quelin v. Moisson*, I submit that the defendant is entitled to judgment.

MR. MITCHELL, in reply.—Bankruptcy causes a stay of action, but it is not a discharge, at most it is an interference with the procedure. The Courts have decided that they will not stay actions except under certain circumstances, even though an action on the same claim be pending in a foreign court.

Cur ad Vult.

Sept 1.

MR. JUSTICE HODGES.—The plaintiffs bring this action on two judgments obtained by them against the defendant in the Courts of New South Wales. The defendant answers that he is insolvent within the meaning of the New South Wales Insolvency Act, and that his estate had been sequestrated, and that the defendants have proved for their debt, and he contends that this is an answer to the action. By sec. 54 of the New South Wales Act, insolvency divests all the property of the insolvent out of the insolvent, and vests it in the Chief Commissioner of Insolvent Estates. By a subsequent section all actions against the insolvent are stayed, and all persons are prohibited from bringing any action against the insolvent. It further appears that there is no proceeding of any kind that can be taken by a creditor to recover his debt. The only remedy a creditor has is against the estate of the debtor, and although the Act does not discharge the debtor until he gets his certificate, it prevents the creditor suing the debtor by any remedy of any kind, and as New South Wales is the forum of the obligation, and as in the forum of the obligation no proceedings of any kind can be taken against the debtor, therefore the debtor cannot be sued here. That view, I think, is supported by the case of *Ellis v. McHenry*, L.R. 6 C.P., 228. For in the considered judgment of that case *Quelin v. Moisson*, 1 Knapp, p. 265 is referred to and recognised. I cannot distinguish that case from this, and, therefore, I am

of opinion that the defendant is entitled to judgment and will enter up judgment for the defendant, with costs.

Solicitors for the plaintiff, *Braham and Pirani*;
Solicitors for the defendant, *Gaunson and Wallace*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Webb and Hood, J.J.)

MOUNTAIN HOMES LAND AND INVESTMENT CO. LD. v.
MARSHALL AND OTHERS.

5, 8, 9 June

Company Memorandum of Association—ultra vires.

The memorandum of association is the charter of companies registered under the "Companies Act 1890" and any contract or any matter not included in the memorandum, which is to contain the objects for which the company is established, is ultra vires of the directors, and does not bind the company, and being, in its inception, void, it cannot be ratified.

Action instituted by The Mountain Homes Land Investment Company Limited against John Marshall, Samuel Gardiner and Granville Sharp Price; the last two named defendants were sued as the trustees of the insolvent estate of Harold Sparks, whose estate was sequestrated on the 30th August 1889. The facts were as follows:—On the 31st July, 1888, Marshall and Sparks purchased by a written contract from one Walker certain land at Sandringham upon certain terms, which it is not material to this report to state. On the 24th April 1889, Sparks deposited with one J. M. Smith various securities including the above mentioned contract to secure repayment of a certain advance. On the 29th Nov., 1889, the said advance and the benefit of all securities for the same were transferred by J. M. Smith to the plaintiff by deed. The objects for which the plaintiff company was established, as disclosed by its memorandum of association included the following:—(1) To purchase, acquire, take in exchange, and hold freehold or leasehold land as may be deemed expedient from time to time; (7) To make loans or advances upon freehold securities and to accept and take such securities and assurances therefor as may be considered necessary or advisable and to negotiate loans of all descriptions upon any terms as to profit or remuneration; (13) To do all such other things as may be incidental or conducive to the attainment of the above objects.

The plaintiff claimed (inter alia), a direction to the defendants Gardiner and Price to do all such things etc. as may be necessary to enable the plaintiff to get the benefit of its security over the land in question: an injunction restraining Marshall from dealing with the land; sale of the land; and accounts. The defendants, in their respective defences, objected that the contract of the plaintiff with J. M. Smith was void as being ultra vires of the plaintiff.

Mr. Isaacs and Mr. Weigall for appellant (plaintiff)

The company was empowered by its memorandum of association to do the following things:—(1) To buy a debt; (2) To take a security over real estate; (3) To acquire any interest in real estate; (4) To take collateral security to a loan on a mortgage of real estate; (5) To buy promissory notes; (6) To do all acts incidental to the objects for which the company was formed. It is submitted that what the company purchased was an interest in freehold land. (Webb, J.—No, only a right to an account, not to an interest in the land.) Buying a debt is included in clause 7. (Webb, J. Buying a debt is not making a loan. Hood, J., How can it be said that the plaintiff lent money to Sparks?) There can be no difference in its going through the hands of Smith; it is like taking a transfer of a mortgage. (Hood, J. Are not the words of the memorandum to be strictly construed as against the directors?) The company is empowered to do the particular act or anything incidental to it under clause 13. (Webb, J. You must get the principal, before you get anything incidental to it.)

Mr. Topp (and *Mr. Bryant*) for the respondent (defendant) Marshall were not called upon.

Mr. Goldsmith (and *Mr. Agg*) appeared for the respondents (defendants) Gardiner and Price.

The following cases were referred to:—*Ashbury Railway Carriage and Iron Co. v. Riche* L.R. 7 E. and I. App. 653; *Johns v. Balfour* 1 Megonen's Company Reports 161; *Attorney-General v. Great Eastern Railway Company*; 5 App. Cas. 473.

HIGINBOTHAM, C. J.—This is an appeal from the judgment of *Hodges, J.*, dismissing the action without costs. The plaintiff company, being a company registered under *The Companies Statute, 1864*, claimed amongst other things to be entitled to a one-half share and interest in certain land bought by the defendant, Marshall, and one Harold Sparks, on July 31st, 1888, for the price of £1754, a portion of which was paid by Sparks. In pursuance of an agreement, dated March 26th, 1889, Sparks deposited with John Matthew Smith various securities, including the contract for the purchase of the land, to secure repayment of advances to him by Smith. On November 29th, 1889, J. M. Smith and the plaintiff company executed an indenture whereby, after reciting that the sum of £4146 1s. 9d. was owing to J. M. Smith by Sparks, on the security therein mentioned, and that the plaintiff company had agreed to pay the sum of £4062 2s. 9d. to J. M. Smith upon having a transfer as therein-after mentioned, it was witnessed that, in consideration of the sum of £4062 2s. 9d., of which £1000 was paid in cash, and the balance by the promissory note of the company. J. M. Smith did thereby assign to the company and its assigns the sum of £4146 1s. 9d., owing to J. M. Smith on the security before mentioned, and all interest due and to become due for the same, and the benefit of all securities for the same, as set forth in the first and second schedules, and all the right, title, and interest of J. M. Smith thereto.

The deed also contained a covenant by J. M. Smith that he would at all times, on a reasonable request and at the expense of the company, make, sign, and execute all other deeds and assurances for the better or more satisfactorily granting, transferring, and assigning, or otherwise assuring the said moneys and premises and every part thereof to the company.

The defendant, Marshall, in his defence gives notice that he would object that under the Memorandum and Articles of Association of the plaintiff company it had no power to purchase a debt, or to take any such assignment, or enter into any such agreement as that mentioned in the fifth paragraph of the statement of claim, namely, the indenture of Nov. 29th, 1882. The other defendants, who are trustees of the insolvent estate of Sparks, in their defence raise a similar objection. The learned primary judge applied the rule laid down in the *Ashbury Railway Carriage and Iron Coy. Ltd. v. Riche* (L. R. 7 E and I, App. 653). It was there held that the Memorandum of Association is the charter of companies registered under the Trading Companies Act, and that any contract or any matter not included in the memorandum, which is to contain the objects for which the company is established, is *ultra vires* of the directors, and does not bind the company, and being in its inception void it cannot be ratified. The primary judge ruled that the contract between the plaintiff company and J. M. Smith contained in the deed of Nov. 29, 1889, was made by the directors of the plaintiff company upon a matter or for an object not included in or warranted by the memorandum of the company, and that it was, therefore, *ultra vires* of the directors, and the plaintiff company could not maintain this action upon it.

This decision is now appealed against. In considering the arguments now adduced to us in support of the appeal we think that they must be decided by the facts of the case as they are stated in the deed of November 29, 1889. It is not suggested that this document does not contain the true facts of the case. It is consistent with the oral evidence given at the hearing, and it is unnecessary, the facts being plain, to inquire into the probable motives of the parties. The transaction between the plaintiff company and Mr. J. M. Smith as disclosed by this document, was a purchase by the plaintiff company from J. M. Smith of the securities he held from Sparks in consideration of the payment by the plaintiff company of Sparks' debt to Smith. Did this transaction come within any of the thirteen objects for which the plaintiff company was established, as announced in its memorandum of association? We are of opinion that it did not. The particular arguments addressed to us in support of the appeal were these. First it was contended that this transaction came within object No. 1 of the company, namely,

To purchase acquire take in exchange and hold freehold or leasehold land as may be deemed expedient from time to time.

Now the plaintiff company did not acquire any freehold land by its agreement with J. M. Smith. All that it acquired with respect to the land in which it claimed to have a share was the bare right to hold the

contract for the purchase of that land until the amount that had been advanced upon it was paid. The contract itself was not assigned to the plaintiff company, but only J. M. Smith's right as pledgee to retain it and the other securities on deposit to secure the repayment of the amount he had advanced to Sparks.

It was next argued that the case came within the object stated in the 7th paragraph of the memorandum of association, which is in these words:—

“To make loans or advances upon freehold or leasehold securities and to accept and take such securities and assurances therefor as may be considered necessary or advisable and to negotiate loans of all descriptions upon any terms as to profit or remuneration.”

It is said that the terms of the deed are consistent with a transaction founded on the loan by the plaintiff company to Sparks, namely the transaction by which on an application by Sparks the company would advance money to him to pay off his debt to Smith and take a transfer of the securities. And if it had appeared that such agreement had been made in fact with Sparks, it is not improbable that it might be carried out in the terms of this deed. But an examination of the evidence shows that the whole transaction was one of purchase of the securities from Smith only, and not from Sparks through Smith, and that Sparks had in fact nothing to do with it. The dealing being one between the plaintiff company and Smith, it was certainly not either a loan or an advance; it was a purchase from Smith of Sparks' debt to him. Even if it could be regarded as a loan, or advance, it was not a loan or an advance on freehold securities. The deposit of a contract to purchase land cannot properly be called a freehold security in the sense of creating by way of security any right to or interest in the land itself.

It has been argued further that the case comes within the object stated in the 13th paragraph of the Memorandum of Association, namely:—

“To do all such other things as may be incidental or conducive to the attainment of the above objects.”

The memorandum must be construed as a whole in a reasonable way. *Johns v. Balfour* (1 Megon's Company Reports 161). If the execution of the Indenture of Nov. 29th, 1889, could be shown to be reasonable and conducive to the attainment of any one of the previously enumerated objects of the plaintiff company, the deed should be upheld; but the transaction does not come, either expressly or by reasonable implication, within any of the previously enumerated objects. It must, therefore, be deemed to be a transaction prohibited by the Legislature. *Attorney General v. Great Eastern Railway Coy.* (5 App. Cas. 478). And the act by which it was attempted to be carried out is not an act authorised by the 13th paragraph of the memorandum.

Lastly, it has been contended that the transaction is outside of the rule in *Ashbury Railway Carriage and Iron Company v. Riche* (L.R. 7 E and I App. 653); that the plaintiff company has acquired by conveyance from J. M. Smith, and not by contract, certain property which it is empowered to hold, and that Marshall

holds that property, namely Sparks' half share of this land in trust for the company. The answer to this argument has already been given. The deposit with the plaintiff company and the contract for the purchase of the land in which Sparks had a share did not confer on the plaintiff company any right to, or interest in, Sparks' share, or any claim against Marshall, who holds possession of Sparks' share; it only gave to the plaintiff company the right which J. M. Smith had, namely, the right to hold the contract as security for the repayment by Sparks of the amount advanced upon it. Moreover, we are of opinion that Marshall could not be held to be the trustee for the plaintiff company of any interest in this land, seeing that the interest, if it existed, sprang directly out of a contract which the company was incapable of entering into.

The learned primary judge was substantially right, in our opinion, in the principle of law and the rules of construction which he applied to the decision of this case. The appeal, therefore, will be dismissed, with costs.

Solicitors for plaintiff;—(appellant) *Ellison & Simpson*, for defendants (respondents);—*Dixon & Bruham & Pirani*.

(Before Higinbotham, C.J., A'Beckett, and Molesworth, J.J.)

Re MYERS, AN INSOLVENT.

18th Aug.

Insolvency Act, 1890.—Powers of a Judge of the Court of Insolvency.

A judge of the Court of Insolvency, as well as the Court of Appeal, is under no obligation, though he has the power, to set aside an order of sequestration, which is bad.

Appeal from an order made by a judge of the Court of Insolvency refusing an application to set aside an order of sequestration.

[The facts appear in the Judgment.]

Mr. Higgins appeared in support.

HIGINBOTHAM, C.J.—This is an appeal from an order made by a judge of the Court of Insolvency refusing an application to rescind and set aside an order to sequester dated the 1st of June, 1874. That was an order founded upon a petition for the sequestration of a partnership, J. D. Myers and Co., which consisted of two partners, J. Myers and Joseph Davis. Mr. Davis left Victoria on 1st of March, 1873, and returned again in April, 1878. In the meantime, and during his absence, on the 1st of June 1874, his partner presented this petition for voluntary sequestration. That order for sequestration was clearly a bad order, as the petition was presented by one only of the partners, in the name of the firm, one only being at that time within Victoria, and therefore not constituting a greater number of the partners of that firm. Mr. Davis returned to Victoria in March, 1878, and from that time down to the date of this application he took no steps to relieve himself from

the consequences of this invalid order of sequestration. He now applies to the Court of Insolvency to rescind that order, and he has had no difficulty in showing that the order was bad, and the learned judge below acted upon the conclusion that that order was bad. Mr. Davis applied to the learned judge of the Court of Insolvency to set aside that order, and he now appeals to this court on two grounds. It is contended that he has a right to claim a rescission of that order of sequestration on the ground that it is bad. There can be no doubt that the learned judge and this court of appeal have power to set aside or to amend that order, but I do not think that it has been shown, or that it could be shown, that this court is under any obligation to set aside this bad order, and therefore this appeal must be dealt with as an appeal from the discretion of the learned judge of the Court of Insolvency. In that view the learned judge has stated the grounds of his decision, which appear to us to have very great weight indeed, and to support his judgment that the Court ought not at present and under existing circumstances to exercise its power to rescind the order made. Mr. Davis has been 13 years in Victoria, and has been enjoying the protection afforded by that order during all that time; he offered no explanation or reason which induced him to wait for all this time. We are of opinion that an application of this kind should be supported by reasons for the delay, and by steps to give notice to all persons who might have rights under that sequestration. Every step should be taken fully to satisfy the learned judge on all facts known to Mr. Davis, and which should be explained by him. We are not prepared to say that the learned judge below has exercised his discretion improperly. The appeal will be dismissed, but without prejudice to the appellant to make further application if he should so desire.

Solicitors.—*Braham & Pirani.*

(Before Higinbotham C. J., A'Beckett and Molesworth J. J.)

HETHERINGTON v. DRISCOLL (THE BOARD OF LAND AND WORKS GARNISHEES.)

19th August.

Justices Act, 1890 S.S. 117, 118, 141.—Meaning of aggrieved—debts owing or accruing. The debtor in a proceeding under S.S. 117, 118 of the Justices Act, 1890, may obtain an order to review the garnishee proceeding under S. 141. When the payment of money is dependent upon a condition precedent e.g. the final certificate of an architect, no attachable debt is constituted until the architect's certificate is given. Order to review an order of justices.

The order to review was entitled in the matter of the Justices Act, 1890, and of an application thereunder of Phibbs Hetherington, for the attachment of

debt, wherein the said Phibbs Hetherington was complainant, John Bernard Driscoll was defendant and the Board of Land and Works, described as the Public Works Department garnishees.

The order to review had been obtained by the judgment debtor, Driscoll, and the ground upon which it had been obtained was that there was no evidence that the garnishees were indebted to the said John Bernard Driscoll on the 17th March, 1891. Phibbs Hetherington had obtained an order nisi on the 17th March, 1891, for the attachment of debt, in a court of petty sessions, calling upon the Board of Land and Works to attend on the 24th March, 1891; the subsequent proceeding was adjourned until the 9th April, 1891, on which day an order was made for payment by the garnishee to Hetherington of £8 6s. 9d., the amount of an order made against Driscoll and in favour of Hetherington. Driscoll had entered into a contract with the Board of Land and Works according to the terms of which payments were to be made at every 30 days, as the work contracted to be done, proceeded, on the certificate in writing of the superintending officer at the rate of 90 per cent on the value, in the judgment of the superintending officer, of the work actually done, the balance due, after the superintending officer should have certified under his hand that the work had been finally and satisfactorily completed, and that such balance was due to the contractor was to be paid over on the expiration of 14 days from the date of the certificate. It appeared that on the 17th March, 1891, the final certificate had not been given by the superintending officer.

Mr. Denistoun Wood appeared in support of the order to review, and also on behalf of the Board of Land and Works.

Mr. Woinarski showed cause. There is a preliminary objection to this order; it has been obtained by the debtor, the person against whom the original order in the police court was made; the judgment debtor cannot obtain an order to review a garnishee proceeding; *Roberts v. Death* 8 Q.B.D. 319; *Hickling v. Kelly* 11 A.E.T. 158. *Edwards v Jones* 14 V.L.R. 224 were cited.

Mr. Denistoun Wood contended that if the judgment debtor could show a "grievance" he came within the terms of section 141 of the *Justices Act, 1890*.

The court decided to hear the order to review.

Mr. Woinarski, in showing cause on the merits contended that the money coming to Driscoll at the time of the order nisi being made in the Police Court was an attachable debt.

Mr. Denistoun Wood, in reply: There was no debt owing or accruing due to the judgment debtor until the certificate of the superintending officer of the Board of Land and Works had been given; the certificate had not been given until some time after the date of the order nisi in the police court; the debt, therefore, could not have been attached.

Per Curiam. The order must be made absolute with costs.

Solicitors in support: *Potts*; to oppose, *M^r Farlane and Tolhurst.*

(Before Higinbotham, C.J., A'Beckett, and Molesworth, J.J.)

MURPHY v. LEE.

21 August.

Police Offences Act 1890 s. 6—Bye-Law—Hawker—Linger or Loiter.

A bye-law of the city of Ballarat provided as follows:—

"Any person offering for sale any commodity in any street of the city shall not linger or loiter in such street nor occupy any fixed stand therein, but shall keep moving along such street on the side thereof situate on his left hand, at a reasonable walking pace of not less than one mile per hour and shall not travel the same road, street, or pathway more than once in the same hour."

Held by the majority of the court (Higinbotham, C.J. dissentiente) that a hawker remaining for 35 minutes in the same place does not comply with the regulation. Order to review an order of justices at Ballarat.

[The facts appear in the judgment.]

Mr. Box appeared in support of the order to review. (There was no appearance to show cause).

HIGINBOTHAM, C.J.:—Order to review an order of justices dismissing an information charging the defendant for that he being a person offering a certain commodity for sale did linger in a certain street, to wit, Sturt-street, Ballarat. The charge was brought for breach of a regulation of the city of Ballarat, made under section 6 of the *Police Offences Act 1890*, for keeping order in the carriage and footways and public places in the city of Ballarat, and for preventing any obstruction thereof. The regulation was in the following terms:—

"Any person offering for sale any commodity in any street of the city shall not linger or loiter in such street nor occupy any fixed stand therein, but shall keep moving along such street on the side thereof situate on his left hand, at a reasonable walking pace of not less than one mile per hour, and shall not travel the same road, street, or pathway more than once in the same hour."

Evidence in support of the charge was given by Constable M'Kenzie, who deposed that on the 24th March, 1891, at 5 minutes to 5 o'clock p.m., he saw the accused, Thomas Lee, standing at the corner of Grenville and Sturt-streets, in the city of Ballarat, with his cart, containing fruit; that the accused was standing alongside his fruit cart conversing with some people; that he watched the accused for 35 minutes; and that during the whole of that time the accused remained in the same place; and that he saw the accused serve at least one customer. No evidence was offered for the accused. The magistrates dismissed the information, with one guinea costs. I am of opinion that the magistrates were right, and that upon a reasonable and true interpretation of this regulation, no breach of it was proved. The object of the regulation was to prevent itinerant vendors of commodities from taking up a fixed stand in any street and from unduly delaying therein, and thereby causing obstruction of the street. It was not intended that the vendors or hawkers

should keep in perpetual motion. Such a regulation would be altogether unreasonable, and would prevent such persons carrying on their lawful trade. What rate of motion, then, must a hawker observe in order to avoid committing a breach of the regulation? The regulation itself supplies the answer to the question. He must travel at a reasonable walking pace of not less than one mile per hour, and he must not travel the same street, road, or pathway more than once in the same hour. This is the test and the measure of the rate of speed required by the regulation. If the hawker does not traverse a space of one mile in the hour at a reasonable walking pace he breaks the regulation. If he complies with that requirement he commits no breach of the regulation, though he stops at one place for half-an-hour or more looking or waiting or serving customers. If a regulation did not provide some test or measure of what lingering and loitering is, I think it would be an unreasonable and a bad regulation. If these latter words of this regulation do not provide such test or measure they have no meaning at all. Applying them to the facts deposed to by the constable it is clear, in my opinion, that the charge in this case was not proved. I am of opinion that the order to review should be discharged, but without costs, as the accused as not appeared. As, however, the majority of the members of the Court are of the opposite opinion, the order to review will be absolute with costs: the decision of the justices will be set aside, and he case will be remitted for hearing.

A'BECKETT, J.—No evidence was called for the defence, but it was submitted that no breach of the regulation had been proved. The magistrates dismissed the summons with one guinea costs, but declined to give any reasons for their decision, although requested so to do. I think that there was a clear breach of the regulation, and that Thomas Lee should have been convicted. How can it be said that a man who remains in a place for 35 minutes complies with a direction to keep moving along at a reasonable walking pace of not less than a mile an hour? The magistrate seemed to have supposed that as he had left himself 25 minutes to travel a mile, it did not matter how much he had obstructed the street for 35 minutes, that he might loiter by standing still for any part of an hour if he completed a mile within the other part of the hour, and thus defeat the plainly expressed object of the regulation. It would be obviously absurd to hold that the regulation required a uniform rate of unbroken progression, so that if the hawker stopped to serve a customer, or to pick up a fallen orange, he would subject himself to a penalty. It deals with persons passing along the street for the purpose of selling their goods, and therefore inferentially permits such stoppages as are necessary to enable them to sell. A stoppage in one spot for 35 minutes was not in this case, and could not be in any case, justified by such necessity. The requirements of the most active trade of a hawker could well be attended to while moving at the rate of one mile an hour. But even if they could not be, I should say that the convenience of the hawker must yield to the convenience

of the public, and that he could not break a regulation lawfully made to prevent obstruction of the street, because the regulation interfered with his carrying on business there. The regulation reasonably interpreted leaves ample facilities for sale in moving along the street, but prohibits the fixed stand there which the magistrates' decision has authorised.

MOLESWORTH, J.—Order to review a decision of magistrates at Ballarat on the ground that the decision was wrong, as on the evidence given that justices should have made an order. By which I understand is meant the justices should have convicted the defendant. The defendant was summoned for the breach of a regulation for lingering in the street. In my opinion, all the words in the regulation in question cannot be literally interpreted. I do not think it was meant that a fruit hawker should be continually moving along the street, and that he should never stop to serve a customer; nor do I think it was meant that a fruit-hawker should linger or loiter in the street, or occupy a fixed stand therein, provided he travelled at least a mile every hour. The regulation was, I think, made to prevent lingering or loitering, but not to unreasonably interfere with business. In the present case the justices should, I think, have convicted the defendant. The evidence proves that the defendant was standing in the street alongside his cart, containing fruit, for 35 minutes, without moving on; that during that time he served at least one customer, and that he was conversing with the people about him. It was not pretended that he was selling fruit to these people, no evidence was called for the defence, and the defendant made no statement to the justices by way of answer to the charge. The order to review should I think be made absolute, with costs, the decision of the justices should be set aside, and the case submitted for re-hearing.

Solicitor for complainant, *Cuthbert*.

IN THE SUPREME COURT OF TASMANIA.

(Before the Full Court.)

MUGLISTON V. DILLON.

BRIGHTON ELECTION PETITION.

July 14th, 15th, 16th, 17th, 18th,
20th and 24th, 1891.

*Electoral Act, 1890 (54 Vic., No. 13) part I.V.—
Bribery—Corrupt Practices—Bets—As to validity
of Writ for Election of Members
Petitioner in person.*

Perkins and Mr. Clarke for respondent.

The petition alleged bribery, undue influence and treating by the respondent and his agents; the petition also contained a charge of general drunkenness, but this was abandoned at the hearing. The facts of the case appear in the judgments which were delivered on July 24th.

THE CHIEF JUSTICE :—This is a petition by Henry B. Mugliston, a candidate at the recent general election for the House of Assembly for the Electoral District of Brighton, against the return of Thomas Dillon, on the grounds of bribery, undue influence, and treating by himself and his agents, and the petitioner claimed the seat. The latter claim may be at once dismissed, as assuming that bribery, undue influence, and treating were proved on this inquiry, there would be no such absolute and notorious disqualification of Mr. Dillon at the date of the election as would justify this court in declaring Mr. Mugliston to have been duly elected; for these disqualifications do not arise till after the candidate had been found guilty of them, and, therefore, the electors could have had no notice of them when they voted. *Drinkwater v. Deakin, L.R., 9 C.P., 628.* Certain legal objections were raised by counsel for the respondent to the writ, which it was contended was bad, and that there had been no valid election, and that, therefore, there could be no candidate to become petitioner, and no member to be unseated. Whether such an objection is open to the respondent, who has taken the oath and signed the declaration required by members of Parliament, and has taken his seat, is a matter open to question. But to deal with these objections. Section 84 of the Electoral Act, 1890, provides that the writ shall be issued by the Governor, "and shall be returnable within 30 days from the date thereof." It proceeds "Every such writ shall specify the following particulars :—1. The period within which candidates may be nominated. 2. Some polling-place to be the principal Polling-place. 3. The day for taking the poll. 4. The day on which the writ is made returnable by the Governor, provided that in the case of any vacancy arising in the Legislative Council or House of Assembly the writ shall be issued within seven clear days after the happening of such vacancy." The writ is dated on May 1, and is made returnable on June 1. It was in fact received by the Governor on May 30, and received by the Clerk of the Assembly on June 1. The 30 days within which the writ would be returnable, expired on May 31, and that day was a Sunday. The first objection was that the writ was made returnable "on or before June 1." It was argued that "on or before" did not specify a day for the return, but if the words "on or before" were omitted, a writ returnable on June 1 would be well returned if it was returned at any time before June 1, so that adding the words "or before" only gives the legal effect of using the word "on" only. The return is continuous, if I may use the expression, and being placed in the hands of the proper person to whom it was returnable, the return took legal effect on and from the day it was made returnable. The object of fixing a day for the return is, in fact, only to limit the time within which it shall be returned. It was next objected that the writ was not made returnable within 30 days from its date. Section 4 provides that "when any day provided or approved by, or under this Act for any purpose shall happen on a Sunday, such provision or appointment shall take

effect as for the day following." If, therefore, the writ had been made returnable on Sunday, May 31, which would have been in proper time then by the operation of section 4, the writ would have been returnable on June 1. The writ has inofficially made the return day of June 1, instead of May 31, but the effect is the same. Section 85 provides that "All such writs shall be framed in any manner and form which is sufficient for carrying the provisions of this Act into effect." The writ is made returnable within the time that the joint exercise of the Governor's powers, and the provisions of Section 4 require it to be returned, and whilst irregular in form it in substance carries out the provisions of the Act; and, therefore, is within Section 85, "sufficient for carrying the provisions of the Act into effect." It may also be observed that in Section 84, sub-section 4, which requires the Governor to specify the day on which the writ is returnable, it is provided that in the case of any vacancy the writ shall be issued within seven clear days. Here the word "shall" is clearly directory only; for it would hardly be contended that, in case a writ was not issued till after seven days the district was for ever disfranchised. There can be no doubt that an election held under a writ so issued would be valid. Where in the same sub-section the word "shall" is clearly directory it may well be held that in any matter not directly affecting the substance of the election itself, it is also directory. Here the writ is clearly regular as to the nominations and holding of the election, and the nomination and poll have been duly made and declared, and to hold the election to be void because there was an informality in the writ in stating when the return was to be made, and it was in fact made within the limits set by the Act for its being made, would be allowing a technicality to prevail over what is substantially in conformity with the Act. In the *Longford case* 2 O'M. and H. 7, the law required that the sheriff should within two days after the receipt of the writ make a proclamation of the time of holding the election. The sheriff did not do so till the third day, and it was contended that the election was void. Mr. Justice Fitzgerald said that at present his opinion was adverse to the construction that the election was void. Afterwards, the election was declared void on other grounds. Again in the *Drogheda case* 2 O'M. and H. 202, it was contended that the election was void because the polling stations were not opened till a quarter to 9 o'clock instead of 8 o'clock, as the Statute directed. Mr. Justice Barry said that being satisfied that the fact had not the remotest effect upon the result of the election, he would not declare the election invalid by reason of the irregularity. He added—"At all events, it does not appear to me that in all these cases the elements of common sense and the reason of the thing has not largely to enter into the consideration of the tribunal." Acting on this principle, and for the reasons stated, I am of opinion that the legal objections must be overruled. The evidence given has been, in the case of many witnesses, most unsatisfactory, a manifest reluctance being shown to

speak the whole truth, and this has rendered the duty cast upon the court of deciding questions of fact, one of no ordinary difficulty and responsibility. The case divides itself into two branches—1st, whether there was bribery; and 2nd, treating. As to bribery, I cannot find bribery or undue influence in the subscriptions to the racing club, cricket club, ploughing match, Broadmarsh sports, or Sunday school, nor in taking 100 shares in the Milling Co., nor in the offer to use influence to secure a punt from Ministers over the Lower Jordan. Had the subscriptions been excessive in amount and not, as they are in fact moderate, then there would have been some evidence that they were intended to corrupt the electors. As to such subscriptions Mr. Justice Willes, in the *Westbury case*, 1 O'M. and H. 40, says, "I do not think anything of it. I have myself often observed that people who mean to become candidates often subscribe things they should otherwise not have subscribed to; but I think it is a step off corrupt practices; it is charity stimulated by gratitude or hopes of favours to come. It was admitted by the petitioner that such acts would not be improper on the part of the sitting member and I can see no difference between what he may lawfully do in this respect and a candidate who is going to oppose him as soon as opportunity occurs. What is bribery in the one is bribery in the other and the converse. I will come at once to the more material portion of the evidence, and I will first consider that relating to the bets with Daniel Brown. As to bets, in *Busby on Elections*, p. 108, it is laid down that bribery "may be committed under various colourable pretexts, as for instance, where a man offers to bet against his own side with a voter, the intention of the person making the offer would be presumed to be corrupt, and the bet if taken, would as regards him, be a bribe." Daniel Brown in his evidence, gave the following circumstantial account when examined by the Court. He swore as follows—"I saw Dillon at the Exchange Hotel, in the dining-room. We were having a glass of whisky together about 7 to 8 p.m. There was no one in the room when the first wager was made; no one came into the room before Dillon and I separated. We were drinking in the bar parlour, and Dillon called me into the dining-room. I think Fred Blacklow was in the bar parlour, and five or six others. We were all drinking together in that room. This was about a month or six weeks before the election. Dillon and I were the only two people in the dining-room. Dillon asked me what I thought of the election, what sort of chance he had. I told him I thought he would be returned. He offered to make a bet of £5 to £1 that he was not. I said I will take the £5 that you are returned. We shook hands over it. We left that room and returned to the bar parlour. Dillon left the house shortly after that. There was another bet a short time before the election took place in the same room at 9 p.m. Ned Blacklow was present. We talked the election over, and I bet Dillon a level sovereign that he headed the poll at Green Ponds. I should think Blacklow heard it. We did not shake hands over that. After the £1 bet I

bet him a champagne supper that he would be returned. Mr. Dillon made the offer of that bet. I cannot say whether Dillon or I offered the £1 bet. Nothing was said as to betting a hat." The evidence of Mr. Dillon as to the bets was as follows:—"The conversation as to the bets was in the parlour of the Exchange, it was in the evening. Brown and I were having some whisky together. He (Brown) said I will lay you 5 to 1 that you will get in and a champagne supper. He said he would take from me 5 to 1. I said I can't bet. I never make a bet on the election. I would lose my seat. He said then I will lay you £1 that you will head the poll at Green Ponds. I said 'No, that will upset the election,' then he said 'a new hat.' I said 'No bet whatever.' I then went out of the hotel. There was a commercial traveller and two other men present, a navvy and a shepherd. They were in the same room, and could hear what took place. I do not know their names." I read Mr. Dillon's evidence as to the bets to Brown, who categorically and emphatically contradicted Mr. Dillon's account of what took place. Brown also swore that no mention was made of a new hat. That three other men were not present in the room. He and Mr. Dillon were alone when the first bet was made, and Mr. Blacklow only was present when the second bet was made. Brown voted for Mr. Dillon, and he says he did not ask him to pay the bets, because he was told Mr. Dillon would never pay them. Brown said the bets were binding bets between man and man, so far as he was concerned, and that Mr. Dillon might have been joking, but he did not think so at the time. He took it as serious, as a binding contract between man and man, and would of course have paid the bets if he had lost. Mr. Frederick Blacklow, who was Mr. Dillon's agent at the election, was recalled. He only recollected being on one occasion with Dillon at the Exchange, and has no recollection of Dillon leaving the room with Brown, but he recollected being with Brown and Dillon in the bar parlour. He said he could not speak positively as to a champagne supper being mentioned. He accounted for his want of knowledge by saying that he was very tired that night, and, perhaps, went to sleep whilst Dillon and Brown were talking. To the question of respondent's counsel whether Brown was worse for drink that night, Blacklow answered decidedly that he had never known Brown worse for liquor in his life. There is no reason suggested why Brown should have the slightest interest in deviating from the truth. He was an intelligent witness, and gave his evidence apparently straightforwardly. It is in substance uncontradicted, except by Mr. Dillon. I will next refer to Tonks' evidence. It was objected that his name was not mentioned in the particulars, but it appeared that it was unknown that Tonks could give any evidence till after the case had commenced. It was in the discretion of the court to admit the evidence and to amend the particulars, and if an adjournment was desired it could have been applied for. An offer to bribe by the candidate himself is so great an evil that the court would not hesitate to

do all that was necessary to have the matter investigated—*Longford case 2 O.M. and H. 9*. Tonks swore that he was accompanying Mr. Dillon from his father's house to Mr. Chaplin's house in order to show Mr. Dillon the way. That on the way they talked about the election, and that when they came to the ford their horses stopped to drink. That Mr. Dillon then said, "Will you support me?" Tonks answered "No." Mr. Dillon asked him again. Tonks said "No." Mr. Dillon then said, "If I give you three guineas will you vote for me, and induce other members of your cricket club to vote for me?" Tonks said "No." Mr. Dillon then said, "You don't intend to vote for an educated fool like Mugliston." Mr. Dillon admits that he and Tonks went so far together towards Chaplin's, but denies that any such conversation took place. Tonks is an intelligent man and gave his evidence clearly and emphatically, and there appears no reason for supposing he was not speaking the truth. Mr. Dillon is deeply interested in disproving the evidence of Brown and Tonks. They are comparatively disinterested witnesses, the former a supporter, and the latter an opponent, of Mr. Dillon's candidature. As a judge of fact in this matter I can arrive at no other conclusion than that Mr. Dillon's contradiction is not sufficient to shake the testimony of these two witnesses. The petitioner called attention to other instances of alleged bribery. Some twelve months before the election Mr. Dillon met Hazledean, an elector of Brighton, who gave him from one to two dozen native fresh water fish caught in the Jordan, and thereupon Mr. Dillon gave him half a sovereign. Mr. Dillon says he never saw Hazledean before. It would be carrying credulity too far to suppose that before the transaction closed Mr. Dillon did not become aware of who Hazledean was, and that he did not make Hazledean aware that he was a future candidate, and that the half-sovereign was not paid with a view to promoting Mr. Dillon's candidature. The amount is small, but with reference to this Mr. Justice Willes in the Blackburn case says of an agent, and therefore much more of a candidate, "If an agent bribe one voter with 2s. 6d. . . . the election is void. Although the result of the bribe was nothing as to the poll, the result was in point of law, that an illegality of so gross a character, and so difficult to trace, would have been committed, that no election would be safe, no community would be sure but that elections were gained by the exercise of corrupt practices: unless, for the sake of all, the election in which an agent has been guilty of such a malpractice were held void as against the principal of that agent." The next case to which the petitioner called attention was that of Oakley. Frederick Oakley stated that Dillon made him no offer as to the election, and that he did not tell Barwick he was to get £5. He added that he might have said it in a lark. He said he told Barwick he was going to get a few pounds for running his cart. He says that he did work with a cart and horse that day, and has not been paid, and that no one asked him to do so. As opposed to this, Hanslowe swears that Oakley told him that

Dillon was to give him £10 for the day for his horse and cart. This was two or three months before the election. Joseph Burwick says that Oakley came to him two months before the election and wanted the loan of a horse. He said he had a good thing on hand with Dillon for the election. He was to have £3 for a horse and cart, and the same for a second, and if Dillon got in he was to get £10. This is not carried far enough to directly implicate Mr. Dillon, however suspicious it may appear. Oakley was reticent, and an unwilling witness. The next case to which the petitioner called attention would fall within the same category. Walter Reynolds, driver of a coach for his brother Edward Reynolds, on February 5th last, wrote to John Howell, of the Shannon, that he would drive up and bring him to Brighton free of all costs if he would come and vote for Dillon. Walter Reynolds was also driving electors on the day of election. Dillon's son, 15 years of age, had a gun for which £20 had been paid, and shortly after the election the gun became the property of Walter Reynolds. Mr. Dillon says he sold it to him for £15 10s. cash. These latter cases are sufficient to arouse suspicion, but they are not sufficient to bring home any corrupt practice to Mr. Dillon. I leave my judgment upon what, to my mind, is clearly proved, and cannot infer anything against the candidates by implication. The cases of Brown and Tonks are those on which I cannot do otherwise than find as a fact that Mr. Dillon's action brought him within the provisions against bribery in the Electoral Act. With reference to treating, it must, in the language of the Electoral Act, be corruptly done. This word does not mean wickedly or dishonestly or anything of that sort, but with the object and intention of doing that which the Legislature plainly means to forbid. In fact, giving meat or drink is treating when the person who gives it has an intention of treating, not otherwise, and in all cases where there is any evidence to show that meat or drink has been given it is a question of fact for the judge whether the intention is made out by the evidence, which in every individual case must stand upon its own grounds, and although each individual case may be a mere feather's weight in itself, and so small that he would not act upon it, yet if there is a large number of such cases, a large number of slight cases will together make a strong one; and, consequently, it must always be a very important enquiry. What was the scale, the amount, and the extent to which it was done? per Blackburn, J., *Wallingford case* 1 O'M. & H. 59. "The smallest quantity given with the intention will void the election. But when we are considering as a matter of fact the evidence, we must, as a matter of common sense, see on what scale, and to what extent it was done. Whenever also the intention is by such means to gain popularity, and thereby to affect the election, or if it be that persons are afraid that if they do not provide entertainment and drink to secure the strong interest of the publicans, and of the persons who like drink whenever they can get it for nothing they will

become unpopular, and they, therefore, provide it in order to affect the election—then I think it is a corrupt treating." S. C. Hazledean was at Dillon's meeting at the Prince of Wales. There was drinking. He does not know who culled for it or who paid for it. He got plenty, and got drunk—Dillon was there. Thomas Hutt, who took a requisition round and canvassed for Dillon, was at the meeting. He stood drinks to several friends and, says young Hazledean, was handing round whisky. He won't swear that he did not stand drinks for more than a dozen on election day at Bridgewater. Henry Ogg says he got three bottles of whiskey for a meeting at his house at the Dromedary. Dillon was there, and the meeting was held in reference to his election. Ogg shared out the liquor. There was a second meeting and liquor was served there. Dillon was there and thanked the electors for their presence. Where drinks are served promiscuously to those present at election meetings in the presence of the candidate he is *prima facie* an accessory, and therefore presumably with his consent. It is immaterial whether these drinks were paid for by Mr. Dillon or any friends or supporters, if they were thus given with the intention of promoting his candidature, and as to this I can entertain no doubt. Graham Mortyn says that in February one Sunday night at the Epsom Hotel, Brighton, Dillon asked him to drink, and four or five others in the room, some electors. That at the Cambridge election, on 12th May last, there were about 15 or 16 in the room at Brighton, Mortyn was one of them, with a couple of friends. Dillon asked them and stood all round. At Broadmarsh sports, on 22nd March, Mortyn saw Dillon treating people more than once. David Byrne, who keeps a licensed house at Brighton, says Dillon held a meeting at his house since January; about 15 people were at the meeting. He says he stood two bottles of wine and one of whiskey to those who were there. He says he does not expect to be paid, and that what shouting was done while Dillon was there was done by him (Byrne). This again was treating at an election meeting in the candidate's presence. The evidence discloses other instances of treating, but those to which I have referred satisfy me that there was treating by him or "on his behalf" before or during the election, and that such treating was with the intention of doing that which the Legislature means to forbid, namely, influencing persons to vote for him. I should have felt greater difficulty in finding the question of treating against Mr. Dillon had I not been satisfied that other corrupt means were being used by him to influence the electors. The treating after the poll was declared at Byrne's does not come within the Act, as it was not shown to have taken place in pursuance of any promise made before or during the election, nor is it shown to have been done by any agent of Mr. Dillon. I am of opinion that bribing and attempting to bribe, and also treating, have been committed by the respondent, Thomas Dillon, in reference to the election for Brighton, held on 22nd May last, and that the petition should be

allowed with costs.

JUSTICE DODDS.—The case is stated in the judgment of His Honor the Chief Justice. I am of opinion that the petitioner has failed to prove the charges of undue influence and general drunkenness. With reference to the charges of treating, I think that a case of the gravest possible suspicion has been presented, and if it were necessary to do so I should have little difficulty in saying that the respondent had contravened the provisions of the *Electoral Act*, 1890. But I am willing to give Mr. Dillon the benefit of any doubt that may exist as to the completeness of the proof against him under this head, and exclude from my consideration a large portion of the evidence. I cannot, however, take a similar course with reference to the remaining charge of bribery. What took place between the respondent and Brown, Tonka, and Hazelden respectively is bribery within the meaning of section 124, and the respondent has, in my opinion, been guilty of that offence. There are other cases, notably those of Hutt and Oakley, which might also be sufficient to prove the offence, but I rely only upon those which I think are distinctly proved. In arriving at this conclusion I have not been in any way influenced by the evidence elicited in cross-examination that a judge of this court had some time since doubted the veracity of the respondent. I decline to be guided by an opinion expressed some 15 or 20 years ago upon a case presenting very different features from the present one. I have no sympathy with such a line of examination, and think that it should be resorted to very rarely. I have heard the evidence in this case, and closely watched the demeanour of the witnesses, and I prefer to rely upon my own judgment. But as to that evidence I think it right to say that the greater part of it was, in my opinion, insincere and untruthful. I cannot conceive of anything that would have raised greater suspicion or blackened the case of the respondent more than the way in which many of the witnesses gave their evidence. I have no doubt that those witnesses thought that they were successfully deceiving the Court and favouring the respondent, but the evidence that they gave and their manner of giving it, produced upon my mind the most irresistible impression that Mr. Dillon had been guilty of illegal acts of which they were trying to shield him. They were thus doing him infinitely more harm than good. I take this opportunity of correcting one of the errors in the report of the proceedings which appeared in the newspapers. I am reported to have said that nothing had been proved against the respondent. Counsel will remember that what I did say was that a good deal of what had occurred had not been satisfactorily brought home to Mr. Dillon. Upon the other points raised, I concur in the opinion of His Honor the Chief Justice.

JUSTICE ADAMS.—The opinions I have formed and the conclusions I have arrived at with regard to the petition presented by Mr. Mugliston are in unison with those expressed by the learned judges who have preceded me, and I do not desire to add anything to what they have already said so clearly.

(Before the Full Court.)

JOHNSON & ORS. V. BENNETT.

CAMPBELL TOWN ELECTION PETITION.

July 22nd and 24th, 1891.

Electoral Act, 1890 (54 Vic. No. 13):—*As to validity of roll used at Election—As to necessity of electors signing roll before receiving ballot papers under sec. 103 of Act.*

Perkins:—for petitioners.

Mugliston:—for respondent.

The petition alleged that the respondent was not duly elected on the grounds that (1) the roll used was not the electoral roll in force at the time of the election. (2.) That the electors who voted at the Cleveland polling-place did not sign the electoral roll before receiving their ballot papers. The facts of the case appear in the judgments which were delivered on July 24th.

THE CHIEF JUSTICE.—This is a petition purporting to be signed by forty-eight persons who voted at, or had a right to vote at the election for the Electoral District of Campbell Town, held on the 22nd May last, praying that it may be determined that the respondent was not duly elected. Two grounds are stated—First, that the roll used was not the electoral roll in force at the time of the election; and, secondly, that the electors who voted at the Cleveland polling-place did not sign the electoral roll before receiving their ballot-papers. With reference to electors' petitions, the *Electoral Act*, section 158 provides that "no such petition shall be taken cognisance of, nor any proceedings had thereon unless the same is (3) signed by a number of electors who either voted or were qualified to vote at the said election, amounting to not less than one-tenth of the whole number of electors on the roll of the district for which such election took place." The petitioners contended that the roll of 1891 was invalid, and that the election should therefore have been held on the roll of 1890 under section 59, which provides that—"If in any year the roll of any district is omitted to be regularly made out, or is not perfected, then the roll for the preceding year shall be the roll of such district for that year." The ground upon which the roll for 1891 was contended to be irregular was that no Court of Revision had been held, as required by the Act. Section 41 provides that "on such day as the Returning Officer shall appoint between 22nd January and 22nd February in every year, a Court of Revision shall be held by the Justices of the Peace resident within each district, assembled in special sessions, for the purpose of revising the list of electors, and the Returning Officer has to give notice of the holding of their Court in the *Gazette* and certain newspapers." He gave the requisite notices for 29th January, but no justice attended, except the

Returning Officer himself, who happened to be a justice. He purported to adjourn the Court from Thursday, the 29th January, till the following Monday. He requested the Council Clerk to send out notices of the adjournment, and some notices appear to have been sent, for on Monday eight Justices met and proceeded to revise the list of electors. No Justices having attended on the 29th of January, except Mr. Dowling, who was the Returning Officer, no Court of Special Sessions was constituted, and therefore no adjournment could be made. The Court lapsed, and the voluntary assembling of Justices on the following Monday did not constitute a Court of Revision, and their proceedings as such were *coram non judice*. The Court of Revision has to hear claims and objections and generally to revise the electoral list. The Chairman has then to sign it, and forward it to the Clerk of the Peace, who has to get it printed in a book, and has to sign a copy and send it to the Returning Officer. Section 58 says, "the said printed book so signed as aforesaid by the Clerk of the Peace shall be the electoral roll of such district." In the case of the roll for 1891 it was never before a Court of Revision, nor was it signed by the Chairman of such Court. Section 59 provides that when the roll of any district is omitted to be regularly made out or is not perfected, then the roll for the preceding year shall be the roll of such district for that year. In the present case, the roll for 1891 was clearly "omitted to be regularly made out," and we are of opinion that therefore the roll for 1890 was the electoral roll for the district, which was in force at the date of the election. It was admitted that on the 1890 roll there were 364 electors, and that there were only 34 of the petitioners who were on that roll, that is to say, the petition was not signed by a number of electors, who either voted or were qualified to vote, amounting to one-tenth of those on the roll. It was, however, contended that the petitioners were one-tenth of the electors on the 1891 roll. The roll for 1891 showed 434 electors, and 48 were alleged to have signed the petition. Of these some ten could not write, or authorised their names to be signed. Whether this was a sufficient signing within the Act it becomes immaterial to enquire. The petitioners must be electors, and who are electors at any particular time can only be ascertained by reference to the electoral roll in force for the district. The petitioners insisted that the roll for 1891 was invalid, and yet they claimed to be electors, and therefore entitled to be petitioners, because their names appeared upon it. It was to be held valid for the purpose of supporting their petition, but invalid to hold an election upon. With this contention the Court does not concur. If invalid for one purpose it was invalid for all. There is one other question raised, viz., assuming that the petitioners are properly before the Court, and that the 1891 roll is in force, that the election is invalidated by reason of the voters at Cleveland not having signed the electoral roll. The Act, section 103, provides how the voting shall be conducted, viz.:—Each elector shall enter unattended into the room appointed for the ballot, and

shall first sign his name opposite his name on the electoral roll, and the Returning Officer shall check or mark off on a copy of the roll such elector's name, and shall then deliver him a ballot paper, etc. Then it provides how names are to be struck out, otherwise such ballot-paper shall be invalid, and the section concludes that any person contravening any of the provisions of the section shall be guilty of a misdemeanour. It seems opposed to common sense to hold that a whole election is void because at one polling place some of the provisions of this section have not been complied with, unless such non-compliance should affect the result of the election. But the section itself states that one non-compliance shall invalidate the ballot paper, but as to all imposes a penalty. It would be difficult to hold that if an elector came into the room attended, instead of unattended, or if the Returning Officer at one polling place did not check or mark off on the roll the electors' names as having voted, that the election was void. Yet the provision as to the elector signing the roll comes between these two instances, and is affected by the same language. Under any circumstances the utmost that could be done would be to strike out all the votes given to both candidates at Cleveland as irregularly given, and this could not affect the result of the election. There is authority for treating the provision as to the conduct of the election in directory only. In the *Thornbury case*, L.R., 16 Q.B.D., 739, the Ballot Act, section 2, provides that at the time of voting, the ballot-paper shall be marked on both sides with an official mark, and delivered to the voter. Some 300 ballot-papers were marked with the official mark on the back only, the returning officer counted them as valid. Field and Day, J.J., upheld his decision, but stated a case for the opinion of the Queen's Bench Division, which also upheld the view taken by the Returning Officer. In delivering the judgment of the Court Hawkins, J., says "In considering the construction to be put upon the various provisions of the Ballot Act it should be borne in mind that no enactment contained in it affects the franchise; the Act relates to procedure alone. The right to vote exists exactly as it did before that Act was passed; that Act merely directs the mode in which the vote shall be given, the main object of it being to ensure, as far as possible, secrecy." He adds, "To hold that their votes are void by reason of an omission not pointed out as material by statute, rules, or direction, would be to hold that the statute, rules, and direction were but false, misleading guides to the observance of obligations imposed by law." What is laid down as to the Ballot Act is applicable to so much of our Electoral Act as relates to the mode of voting. Again in the case of *Woodward v. Sarsons*, L.R. 10 C.P. 733, a presiding officer at one polling place had written the number of each voter on the roll upon the face of the ballot papers, 300 in number, before giving them to the voter. This would in the counting enable the names of the voters to become known. The Returning Officer disallowed the votes, and they were not

counted, 234 were for the petitioner and 60 for the respondent. It was contended that the election was void. The Court held that the admitted error of the presiding officer—which did not affect the result—did not render the election void either at common law or under the Ballot Act. The case decides that to render an election void under the Ballot Act for non-compliance with the rules or forms given therein such non-compliance must be so great as to satisfy the tribunal before which the validity of the election is contested that the election has been conducted in a manner contrary to the principle of an election by ballot, and that the irregularities complained of did affect or might have affected the result of the election. We are satisfied that the fact of the electors not signing the electoral roll at Cleveland did not and could not have affected the election. The result of our opinion is—(1) That the roll for 1890 was the roll in force at the election, but that the petition is not signed by one-tenth of the electors on the roll, and that therefore we are by the Act forbidden to take cognisance of it. (2) The second question having been argued, we have expressed our opinion that the admitted irregularity at Cleveland would not render the election void, and did not affect the result. The petition is dismissed on the first ground with costs against the petitioners.

DONNA, J.—I substantially expressed my opinion upon this case at the hearing, and do not think it necessary to add anything further.

IN CHAMBERS.

8th, 14th. September.

(Before a'Beckett, J.)

KILGARIFF v. DRISCOLL.

Rules of Supreme Court, 1884, Order LXV. r. 14.

Set-off—Solicitor's lien—Order LXV. r. 14, only applies to proceedings in any particular cause or matter.

Application on behalf of the complainant, Kilgariff, calling upon the defendant to show cause why a judgment debt in the above action for the sum of £41 9s. due by the defendant to the complainant, should not be set off or allowed as against the sum of £20 due by the complainant to the defendant for taxed costs of an order absolute.

It appeared that the complainant had obtained a judgment against the defendant in Petty Sessions for the sum of £41 9s. The complainant then obtained a garnishee order absolute attaching a sum of money alleged to be due by the Board of Land and Works to the defendant. The defendant then obtained from the Full Court an order absolute to review the latter decision with costs, which were taxed in the sum of £20.

Mr. Amess in support, cited *Pringle v. Gloag*, 10 Ch. D. 676, Order LXV. r. 14.

Mr. Potts to oppose, cited *Roberts v. Buë*, 8 Ch. D. 198.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day said:—In this matter a garnishee order absolute had been obtained by the complainant, and on the application of the defendant an order to review that order was made absolute with costs, which were taxed at £20. The complainant now applies calling upon the judgment debtor to show cause why the judgment debt for the sum of £41 9s. should not be set off or allowed as against the amount of the taxed cost, viz., £20. Counsel for the complainant asked for the order which would exclude the lien of the defendant's solicitor. The defendant's solicitor, on the other hand, contended that he was entitled to the benefit of his lien for costs, and that it would be against the principles ordinarily applied to deprive him of this lien. I think this latter contention was correct. Although the proceedings in the Supreme Court arose out of the indebtedness of the defendant in the Court of Petty Sessions, the order to review was an entirely distinct proceeding from that in which the complainant had established his claim in the first instance, and as the proceedings are entirely distinct, Order LXV, rule 14 cannot apply, for that rule only applies to proceedings in any particular cause or matter. As these proceedings are entirely distinct the defendant's solicitor is entitled to set up his lien. I dismiss the application with £2 2s. costs, and I certify for counsel.

Solicitors, for complainant, *Birtwistle*; for defendant, *Potts*.

(Before a'Beckett, J.)

SWEETNAX v. JACOBS AND ORS.

9th, 14th Sept.

Rules of Supreme Court, 1884, Order XXVIII. r. 6

—Pleading—Amendment—Affidavit—Unless the Court is satisfied that the party applying is acting mala fide, or that by his blunder he has done some injury to the other party which cannot be compensated by costs or otherwise, an application to amend a pleading may be granted at any stage of the proceedings—where an application to amend a pleading is made at a late stage in the proceedings an affidavit explaining the delay is not necessary.

Application on behalf of certain defendants or leave to amend their defence under Order XXVIII r. 6.

Mr. MacHugh in support cited *Tildesley v. Harper*, 10 Ch. D. 393 and *Smith v. Cropper*, 26 Ch. D. 700.

Mr. Weigall to oppose. The application is made at a very late stage and no affidavit is made explaining the delay.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—In this case an application to amend has been made at a very late stage, and I felt disposed to

refuse it on the ground that the affidavit in support did not explain or excuse this delay or state when the necessity for introducing the new matter had become apparent to the defendants' advisers. It appears, however, that the new rules are considered as relaxing the strictness of the old practice as to the necessity for proving matters of this kind by affidavit, and according to the present practice, as laid down in *Daniell's Chancery Practice*, 6th edition, page 395, citing *Tildesley v. Harper*, 10 Ch. D. 393, to which I have been referred, it seems that leave will be given unless the Court is satisfied that the party applying is acting *mala fide*, or that by his blunder he has done some injury to the other party which cannot be compensated by costs or otherwise. I am not, however, prepared to accept the dictum in another case cited, that "There is one panacea which heals every sore in litigation, and that is costs," a saying which may be true with respect to the litigant's advisers, but must often be untrue with respect to the litigant himself, who as defendant, may be smarting under the irritation of delay; or, as plaintiff, may be suffering from the unjust withholding of that which he can only obtain on the trial of an action procrastinated by the negligence of the defendant. If, therefore, I thought that the plaintiff here would be substantially injured by permitting the amendment now asked for I should refuse it; but from all the facts before me I think the case is one in which amendment may be allowed on terms which will not place the plaintiff at any disadvantage. The summons has not been served on a co-defendant, but I think that he could not have successfully opposed the application, and that the reasons which would make it right to order a postponement of the trial at the plaintiff's instance as against the defendant's asking to amend would entitle him to postponement as against the other defendant. From the position of this case on the list for trial, I see no reason why there should be a postponement, but I think the plaintiff entitled to postponement if he asks for it. The circumstances under which the application is made call for full indemnity to the plaintiff for costs occasioned by this dilatory proceeding of the defendants, who might long ago have brought forward the facts which they now seek to plead. I order that the defendants be at liberty on or before the 14th inst. to deliver to the plaintiff, at their own costs, an amended defence in lieu of that originally delivered. If delivered, defendants to pay to the plaintiff costs of this summons and all costs rendered useless or occasioned by such amendment, including therein the costs already incurred in obtaining advice on evidence against these defendants, and the costs of any application to postpone trial which plaintiff may be advised to make. Subject to any such application, cause to stand for trial unaffected by alteration of pleadings, and plaintiff to file copy of amended pleadings with the prothonotary on close thereof. If no amended defence delivered within the time fixed summons to be dismissed with costs. Certify for counsel.

Solicitors for the plaintiff, *Ellison & Simpson*; for defendants, *Tutthill, Geoghegan & Perry*.

(Coram a'Beckett, J.)

IN THE WILL OF ALEXANDER BISHOP.

15th Sep.

Administration and Probate Act, 1890 (No. 1060) s.s. 40, 44—Rules of Supreme Court, 1884, Order XXXI. r. 1—Attorney under power—Caveat—Order nisi—Interrogatories—Where is an application under sec. 40 of Act No. 1060, by the attorney under power of an executor a caveat has been lodged and an order nisi granted, the original executor is not a party to the proceedings and therefore cannot be interrogated.

Application on behalf of William Jardine that an *ex parte* order of Molesworth J., giving leave to the caveators to deliver interrogatories for the examination of John Bishop, be discharged on the grounds that such order was improperly made, and that the learned judge had no jurisdiction to make such order, and that if the facts and procedure had been fully explained to the said judge he would not have made such order.

By consent it was agreed that a'Beckett J. should hear and determine upon the application.

It appeared that William Jardine, as attorney under power of John Bishop, the executor of the testator, had applied that the seal of the Supreme Court of Victoria be affixed to the probate already granted to the executor in Ireland. A caveat had been lodged against the application. An order *nisi* was thereupon granted, and subsequently Hodges J. ordered that the order *nisi* should be set down for hearing before a judge, without a jury, in the ordinary way. On the 11th September Molesworth J. made the order in controversy.

Mr. Kilpatrick in support. John Bishop, the executor, is not a party to this proceeding, and therefore cannot be interrogated. *Molloy v. Kilby*, 15 Ch. D. 162. The order complained of purports to be made under the provisions of the Judicature Rules 1884, but they do not apply. All rules previously in force relating to probate causes are to remain in force until annulled. Sec. 37 of the *Judicature Act* 1883, and Sec. 2 of the *Supreme Court Act* 1890, and Sec. 31 provide that the practice and procedure of the High Court of Justice in England shall be adopted except as to probate causes. Order LXIII r. 1 provides that nothing in the rules shall affect the practice or procedure in proceedings in probate cases.

Mr. Anderson to oppose. Sec. 21 of the *Administration and Probate Act* 1890 provides that the hearing of an order *nisi* shall be conducted in the same manner as nearly as may be upon a trial. The attorney under power is merely the agent of the executor, and therefore the executor is the real party to the proceedings. Order XXXI r. 1 provides that in every other cause or matter a party may obtain leave to administer interrogatories. These proceedings come within the definitions of either a cause or matter, as provided by Sec. 3 of the *Supreme Court Act* 1890,

HIS HONOR said: Sec. 44 of the *Administration and Probate Act* 1890, recognised in cases like the present, the attorney under power only as the executor, and therefore the executor under the will is not a party to these proceedings, and interrogatories cannot be administered to him. I do not think there was any jurisdiction to make the order. I set aside the order with £3 8s., costs and I certify for counsel.

Proctors for applicant, *Lawson*; and for caveators, *Manton*.

(Webb J.)

LAWLOR v. CRISP.

Aug. 28.

Rules of the Supreme Court 1884—Order XIX r. 27—Striking out—Slander—Pleading two defences in same paragraph of defence.

Where in a plea to an action for slander the first part of the paragraph disclosed a defence of privilege and the latter part if sustainable would have been a defence of justification.

Held that the plea as it stood was embarrassing and the latter part struck out.

Application by plaintiff to strike out paragraph 8 of the defence on the ground that it was embarrassing. Paragraphs 2 and 3 of the statement of claim were—

(2) The defendant falsely and maliciously spoke and published of the plaintiff the following scandalous words "Don't go to him (meaning the plaintiff) he (meaning the plaintiff) will only have you (meaning one William Orchard) he (meaning the plaintiff) had me (meaning the defendant and he (meaning the plaintiff) will have you" (meaning the said William Orchard) and the defendant also falsely and maliciously spoke and published of the plaintiff the following false and scandalous words "Don't go down to Lawlor (meaning the plaintiff) he (meaning the plaintiff) will only have you (meaning the said William Orchard) he (meaning the plaintiff) is a shark."

(8) The defendant meant by the said words that the plaintiff was a dishonest, untrustworthy, greedy and unscrupulous man and in business dealings with the said William Orchard would dishonestly overreach and wrong him and that the plaintiff was therefore a dangerous man to have any dealings with.

The plaintiff also claimed special damage by reason of the slander.

Paragraph 8 of the defence the subjects of the application was—

(8) In the alternative the defendant says that if he did speak or publish the said words (which he denies) he spoke or published them without the alleged meaning, and without malice, and only by way of bona fide advice, and warning, to the said William Orchard, in answer to his inquiries of the defendant as to the ownership, sale, and price of, and title to certain land in Footscray, in which, or in the sale of which the plaintiff claimed to be interested. The defendant having previously purchased a piece of land in Foots-

cray from the plaintiff, as owner to which he had not and was unable to give a good title, and of which he was not the legal owner, and in respect of which the defendant was compelled to bring an action in this Court against the plaintiff for specific performance or damages, and incurred all the trouble, annoyance, delay, and anxiety, and loss incidental to such action, which action the present plaintiff subsequently compromised by paying the present defendant damages.

Mr. Kilpatrick in support. It is impossible to say whether this plea is pleaded by way of privilege or justification and it is submitted it does not set-up the latter ground of defence.

Mr. Shiels to oppose. The facts are set out with sufficient clearness to support a plea of privilege and justification. The plea in effect furnishes the plaintiff with the particulars required under Order XXXIV r. 37. (WEBB J., I am with you as to the defence of privilege that is for half the paragraph). Amendment may be allowed in lieu of striking out. He cited *Heugh v. Chamberlain*, 25 W.R. 742; *Lord Hammer v. Flight*, 24 W.R. 346.

HIS HONOR said The first part of the paragraph of the defence objected to is equivalent to a plea of privilege. I do not feel disposed to strike that out as an answer to the claim. But then after this first part without a new paragraph, or even a capital letter, the defence proceeds to say "the defendant having previously purchased" [His Honor read to the end of the 8th paragraph.] Now if this latter part means anything at all, it is a plea of justification. All of the eighth plea after the words "plaintiff claimed to be interested," must be struck out. I reserve liberty to the defendant to plead justification in such form as he may be advised, but as it stands at present this paragraph of the defence is embarrassing. Costs in the cause. Certify for counsel and defendant to have 7 days in which to plead a further defence.

Solicitors—For plaintiff, *Hall*; defendant, *Gillman & Mussen*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Webb, and a'Beckett, J.J.)

THE BRIGHTON & C. COMPANY, LIMITED, v. HOWDEN.

Aug. 25, 26.

Company—Call—Borrowing power. The Articles of Association of a Company contained the following article:—"The directors may from time to time borrow for the purpose of the Company any sum or sums of money, but so that there shall not at any time be so borrowed a greater amount than one-half of the capital then already subscribed for, and all such sum or sums of money so borrowed as aforesaid may be secured by loans, debentures or other obligations of the Company or by mortgage of the whole or any part of the property of the Company or otherwise as the directors may from time to time deem advisable." Held that the giving of a mortgage to a vendor to the Company to secure the payment of unpaid purchase money was not a "borrowing" under

this article.

Appeal from Molesworth, J.

The action had been instituted by the plaintiffs against the defendant to recover £500, being the amount of a call due by the defendant as holder of 2000 shares and interest for the same.

The defendant, by his defence, took three defences, (1) That he was not, at the time the call sued for was made, registered as a member of the Company; (2) that the call was made for an improper purpose; (3) that the call was improperly made; he, also, denied the making of the call. Judgment was given for the plaintiffs.

Mr. Topp and *Mr. Weigall* appeared for the appellants.

Mr. Duffy and *Mr. Higgins* appeared for the defendant.

HIGINBOTHAM, C.J.—This is an appeal from the judgment of Molesworth, J. The action was brought to recover the amount of the fourth call of 5s. each on 2000 shares in the plaintiff Company, of which the defendant was alleged to be the holder. There were three grounds on which the defendant disputed his liability, each of which has raised questions based on facts involved in some degree of obscurity. The first ground of objection is that the defendant was not at the time the call sued for was made registered as a member of the Company, and he proceeds to say that he was not and is not the holder and owner of such shares. The defendant now disclaims the obligation of establishing the latter part of his defence, and he relies on the first part that he is not registered on the books of the Company. We think that an action for calls can be authorised and could be supported against a person who is proved to be a member of a Company under the Companies Act, although his name is not registered as a member. In the present case the defendant was one of the original members of the Company, and had signed the articles of association, and he is to be deemed a member of the Company, and he was in fact entered on the register, and there is evidence that the defendant was the owner of these shares at the time the call was made. The call was made on the 12th of October, 1890, and it appeared that the defendant had been entered on the register of the Company as far back as the 27th of July, 1888. Subsequently to the 3rd of July 1889 (at which date certain transactions with respect to these shares took place which will be referred to hereafter), there is a communication between the defendant and the directors of the Company, in which the defendant intimates that he regards himself as retaining possession of these shares, and as being a member of this Company. First, on the 11th of November 1889, he writes to the manager of the Company, and he asks that "Mr. George Mathieson should be allowed to withdraw my shares lodged for transfer with the Company," which shows that at that time the defendant regarded himself as being the owner of these shares. On the same date he joins with several other shareholders in a letter addressed to the Company seeking to call a meeting of the Company, which

clearly shows he regarded himself as a shareholder. On the 17th of October 1890, he receives notice of this call, and on the 23rd he replies by letter in which he says that he was surprised at receiving notice of another call, and that he would certainly protest against the action of the Company. That letter could not be written by anyone who did not regard himself as an owner of shares, and as a member of the Company in respect of those shares. On the 5th of November 1890, he answers a letter of the Manager, and points out the financial position of the Company, and on the 16th of December 1890 he writes to say that he refuses to pay the call on the ground that it had been made for an illegal purpose. Now, all these acts of the defendant, both prior and subsequent to the making of this fourth call, are evidence upon which the learned judge would be justified in concluding that, at that time, the defendant was, and believed himself to be a member of the company, and that even though he be not entered on the register he was liable on account of shares held by him. The defendant now contends that he could only be liable if registered as the holder of these shares, and assuming that contention to be good (though we are of opinion that it is not good) we think there is evidence that at the time the call was made the defendant was registered as the holder of shares in this company. The register produced disclosed transactions involved in great obscurity. One folio of it discloses the defendant as the owner of these shares, and entered in that folio is a transfer from the defendant to one S. Neilson, dated the 3rd of July, 1889. That transfer is erased, and there is evidence that it was erased on the authority of the directors by the new manager of the company on or after the 20th of August, 1889. There is also evidence that a corresponding alteration was then made in the transfer-book of the company, and there is also a minute of the same date respecting the decision of the directors that the defendant's name was to remain on the company's share register. How that transfer came to be entered on the register we do not know. There is some evidence that it was not accompanied by a transfer signed by the defendant or the defendant's authority, and that that transfer was not deposited with the manager of the company, both of which are required. Neither do we know on what ground the directors authorised the alteration to be made. At present the register presents conflicting claims to these shares. On one folio the entry of the transfer is erased, and on another folio the entry, though unerased, is accompanied by a note that the entry is erroneous. It has been contended for the defendant that this erasure is altogether unwarranted. The defendant has relied upon the 17th article of the articles of association, which provides for the carrying out of transfers, but it does not appear that the condition, which might give the right to the transferror to have his name removed and that of the transferee inserted, has been fulfilled. Now, whether the directors erased that transfer from the register on the ground that these conditions had not been complied with,

or, from a belief that they had the right, which they had at first, to judge for themselves whether they would receive the transfer, does not appear. But the register when presented to us no doubt contained an entry of the defendant as owner of these shares, the alleged transfer being erased, and we think that the learned primary judge was at liberty to draw the conclusion from the evidence of these entries and the circumstances connected therewith that that register did contain the name of the defendant as the registered owner of these shares. Then there are statements made by the defendant subsequent to this period, showing that he afterwards regarded himself as the owner of these shares, which might be accepted as evidence of consent to the erasure of this transfer on the ground that the directors had the legal right and power to make that erasure, in view of the facts that the conditions as to the entry of the transfer had not been complied with. But taking all the facts, we think that there is evidence that the name of the defendant was there, and continued there down to the date of the call, and from that time to the time of this action, and if that be so then the provisions of Article 18 have been fully complied with, and there is conclusive proof that this call was due from the defendant. There is no contradiction of this evidence by the defendant, who was not called as a witness, and therefore it must be taken most strongly against him. We think, therefore, that this first ground of objection fails, and that on this ground the plaintiff is entitled to judgment. The second ground of appeal is founded on the 94th article of association of the company, which is directed towards the borrowing powers of the company, and provides that it shall not borrow to a greater extent than to half its paid-up capital. The defendant, after this fourth call was made, raised this objection, and appears to have raised it *bona fide*. He now sets this up as a defence to this action, but we do not think that he has been successful in proving it. The paid-up capital of this company is said to be £50,000, and it is said in the defence that the company had already borrowed more than half of this amount, and that subsequently to this borrowing the company incurred an overdraft for £80,000, and that this call was made to pay off this overdraft; and it is argued that this overdraft was illegally incurred, and that the call made to pay it off was also illegal. That that overdraft was illegally incurred rests upon the assumption that the company had previously borrowed beyond its powers. Now, it is admitted that this alleged previous excessive borrowing arose in respect of the purchase of Molesworth-chambers. When the plaintiff company purchased this property a Mr. Harston had a mortgage over it for £11,000; that mortgage was taken over by the company when it purchased the property. It was a charge upon the property which the company had purchased. We do not think that that can be properly termed a borrowing of money within the meaning of this article 94. It is not a borrowing. It is a charge taken over. The other portion of this alleged excessive borrowing is

made up by a mortgage for £17,000 to Harston to secure the payment to that amount of the unpaid purchase money in respect of this property. That, too, is not, in our opinion, a borrowing of money. Borrowed money, as described in this article 94, is money obtained by the company, and for which security has been given by the company. Therefore, at the time this overdraft was incurred the company had not overborrowed, and therefore even if this call were made to pay off that overdraft, and even if it were distinctly intimated that it was the intention of the directors to apply this call in such a manner, it would not be, in our opinion, for an illegal purpose, and therefore the defendant's second objection also fails. The third and last objection is that one of the directors (Mr. David Abbott), who was present at the meeting at which this call was made, was disqualified from acting as a director by reason of the fact that he held the position of solicitor to the company. It appears that Mr. Abbott was elected as a director on June 20th, 1890, and it is contended that he could not be, and was not, legally elected, and therefore could not be or act as a director in the face of one of the articles of the company, which provides that officers of, or persons holding places of profit in the company, are not eligible for the position of director. Now, the 13th article of association renders it unnecessary for us to give any opinion on this point. By that article power is given to the directors of the company to make calls. At this meeting at which this call was made two directors in addition to Mr. Abbott were present. Therefore this objection also fails, and the appeal will be dismissed with costs.

Solicitors—For plaintiff (respondent), *Abbott, Eales, and Beckett*; for defendant (appellant), *Dixon*.

(Before Higinbotham, C.J., s'Beckett, and Molesworth, J.J.)

TOMPSITT V. WILSON AND MACKINNON.

August 27, 28.

Wrongs Act 1890, s. 5.—Libel. Payment into court of a sufficient sum by way of amends, forms a fourth and an essential element of the defence under section 5 of the Wrongs Act 1890.

Motion for a new trial.

The action had been instituted by Henry Thomas Tompsitt (trading as Rocke Tompsitt and Co.) against Wilson and MacKinnon to recover damages for libel. The statement of claim set out the libel; the defendants, in their defence, alleged the absence of actual malice and gross negligence; they also, pleaded an apology; in addition they paid into court £25. A verdict was found for the defendant, and the presiding judge (Webb J.) directed judgment to be entered for the defendants with costs, the plaintiff to be at liberty to take out the money paid into court.

The grounds of the motion, now being reported were as follows:—(1). That the verdict was against the weight of evidence. (2). That the verdict was con-

trary to the evidence. (3). That the judge misdirected the jury, by directing them as follows: "Mere untruth is not evidence of malice, unless it is coupled with proof that the defendant knew when he published the libel that it was untrue; therefore, you will have to consider whether the defendants themselves, or those who managed their newspaper knew that the statements of fact in this article were untrue." (4). That the judge also misdirected the jury by directing as follows: "If you find that in your opinion there was no personal or actual malice, if you find there was no gross negligence and you find that the apology was sufficient, and published in such a manner as to satisfy the requirements of the case, then you will find for the defendants." (5). That the judge also misdirected the jury by directing them as follows: "I will recapitulate the points; if you are of opinion there was no malice, and no gross negligence, and there was a sufficient apology you will find for the defendants; if you are of opinion there was either actual malice or gross negligence and the apology was not sufficient, then, you will find for the plaintiff; in that latter case, you will assess the amount of damages which you think the plaintiff was entitled to, but utterly irrespective of the amount paid into court." There were other additional grounds which it is not material to this report to state.

Mr. Isaacs (with him *Mr. Mitchell*) appeared in support of the motion.

Dr. Madden and *Mr. Pigott* appeared to oppose.

MOLESWORTH, J. (dissentiente) said,—In this case the 4th and 5th grounds of the motion raise the question whether the learned judge at the trial misdirected the jury. The misdirections complained of are three in number. The first ground is not pressed, but the second and third are substantially relied on. The second ground of objection is to these words:—"If you find that, in your opinion, there was no personal or actual malice, if you can find there was no gross negligence, and if you find that the apology was sufficient, and published in such a manner as to satisfy the requirements of the case, then you will find for the defendant;" and it is alleged that that direction of the learned judge was wrong. The third ground of misdirection is in these words:—"I will recapitulate the points. If you are of opinion there was no malice and no gross negligence, and there was a sufficient apology, you will find for the defendant if you are of opinion there was either actual malice or gross negligence and the apology was not sufficient then you will find for the plaintiff; in that latter case you will assess the amount of damages which you think the plaintiff was entitled to, but utterly irrespective of the amount paid into court." Whether the learned judge was right or wrong in directing the jury as alleged in this part of his charge referred to depends on the proper construction of the 5th section of the *Wrongs Act 1890*. As to that, I agree with the other members of the Court, and I think that the defendant must allege and prove four definite matters—that the publication was without actual malice, without gross negligence, and that the apology was published, and that a sum by way of

amends sufficient in the opinion of the jury was paid into court; that being so I am of opinion that the learned primary judge, though he apparently followed the direction given by Lord Cockburn in a case cited to us, was wrong according to the authorities that have been cited in opposition to the view of Lord Cockburn and that of Mr. Justice Webb expressed at the trial below. The next question that is raised is whether that being so the plaintiff is entitled to a new trial. The defence in this case is pleaded in such a form that I can well understand the learned judge being misled. It would appear, looking at that defence, that there were two defences, first setting up the Statute of Wrongs, and secondly the amount paid into court, and on that plaintiff took issue. It appears that at the trial the learned judge was not asked to leave to the jury the question whether the £25 which had been paid into court by way of amends was or was not sufficient, and apparently the case was fought out on both sides, reference only being made by one side that £25 was too little and by the other that £25 was too much, and the learned judge was not asked to leave specially to the jury whether the £25 was or was not sufficient. If the plaintiff had obtained a verdict, nothing more would have been heard of this misdirection, and I think that this rule 6, order 39, was meant to meet a case of this description. This rule provides—

"A new trial shall not be granted on the ground of misdirection, or of improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Full Court some substantial wrong or miscarriage has been thereby occasioned in the trial."

It is admitted that counsel for the plaintiff, in omitting to ask the judge to put this particular question, acted as he did being in doubt whether that question should be put. However, the learned judge's attention was not called to it. As I understood that rule it is, are we, as judges, satisfied that through this omission some substantial wrong was done? I find, in other parts of the learned judge's charge, that he does call the attention of the jury to this fourth matter as a defence to the action as set up by the defendant. I am not satisfied, speaking for myself, that the statement complained of as a misdirection, coupled with the fact that the four matters were brought before the jury in another part of the charge, caused the jury to find a wrong verdict. If I was satisfied that the learned judge, in consequence of his emphasizing that part of his charge, caused the jury to find otherwise than they would have done if he had not so emphasized it, my judgment would be for a new trial, but as I am not satisfied that any substantial wrong has been done, I do not think the verdict should be disturbed.

HIGGINSON, C.J.—This is an action for libel against the proprietors of the *Australasian*, the defendant pleaded their defence under the 5th section of the *Wrongs Act*. That plea set forth that the libel was inserted without malice and without gross negligence, and that the newspaper was a newspaper published weekly, and

that before the commencement of the action it had offered to publish, and had published in its next issue, a full apology for the said libel. The defendants also brought into court the sum of £25 by way of amends for any injury sustained by the plaintiff by reason of the publication of the libel. On this plea the plaintiff joined issue. The learned judge at the trial treated the three allegations of absence of actual malice, gross negligence, and publication of a full apology as constituting a complete and sufficient defence to the action, apart from the question as to the sufficiency of the amount brought into court. He directed the jury that if they should find that the libel was malicious or published negligently, then they should assess the damages at an amount which they thought the plaintiff entitled to under the circumstances, disregarding the sum brought into court; but if they thought that there was no malice, no gross negligence, and a sufficient apology, then they should find for the defendant, and consequently there has been no finding as to the sufficiency of the amount paid into court. I am of opinion that payment into court of a sufficient sum by way of amends, forms a fourth and essential element of the defence under the fifth section of the *Wrongs Act 1890*. Indulgence is given to persons under this section who incur liability in publishing a libel without malice and without gross negligence. It is assumed that some injury is necessarily sustained by the person libelled, and therefore the person wishing to avail himself of a defence under this section must, in addition to supporting the three allegations, bring a sufficient sum into court by way of amends, estimating it at his own risk. If the sum paid into court is not sufficient, in the opinion of the jury, the defence fails, and the jury have to assess the amount without regard to the amount paid into court, which, in that case, belongs to the defendant. On the other hand the plaintiff is not to be at liberty to take the money out of court and then proceed with the action for the purpose of getting greater damages. He must either accept the amount paid in; or, if he proceed to trial, he must get damages assessed in his favor. In this case the jury have given no finding on an essential part of the defendant's plea, and, in the absence of such finding, I am of opinion that a substantial miscarriage had been thereby occasioned, and the general verdict for the defendant, therefore, cannot stand. Another ground of the motion is that evidence was improperly admitted, viz., evidence of what was proved at a former trial, but as the writer of the libellous article complained of stated that he had a distinct recollection of the former trial and based his article upon such recollection, I think that this evidence was properly admitted as bearing upon the state of the writer's mind and memory at the time he wrote the article. Another point has been taken as to the sufficiency of the evidence as to the first and second ground of the defence; this raises a point of considerable difficulty, which it is not necessary for us to decide now, and in view of this doubt and the peculiar circumstances of this case, including the form of the defendant's plea, I think that the new trial should not be confined to the

question of sufficiency of damages, and that the case as a whole should be sent down for new trial. The costs of this motion and of the first trial to abide the result of the new trial.

A'BECKETT J.—I wish to add a few words as to the point on which a difference of opinion exists on the Bench as to whether or not the misdirection complained of caused a substantial injustice and miscarriage of the proceedings. My reason for thinking that a substantial injustice has been done is this, that the plaintiff had an undoubted right to take the opinion of the jury on the question whether or not, assuming that there had been an ample apology and an absence of malice and gross negligence, £25 was enough to compensate him for the injury sustained by the act of the defendants. No one would suggest that he had not the right to have that question decided by the jury; no one would contend that if the jury had followed the clearly expressed direction of the judge at that trial that they could not, being satisfied as they were on these three points of actual malice, gross negligence, and the sufficiency of the apology, and acting properly and in obedience to the charge, have entered upon that question which it was the right of the plaintiff to have considered by the jury. For that reason I think there was a miscarriage in the proceedings, and that a substantial injustice would be done by allowing this verdict to stand. The question whether or not £25 would be sufficient if it had been acted upon has nothing to do with the matter; no opinion as to the sufficiency of that £25 as compensation for the damage sustained is involved in directing a new trial. It seems to me that we should be acting wrongly sitting here judicially to give weight to the probabilities of the case as suggested by the counsel for the defendants, that the jury might have disapproved of the sum of £25 for compensation, and have said "if we find these three things in favour of the defendant the plaintiff will only get £25, therefore we will take care to find these three things in favour of the defendant." That may or may not be, but it is a mere matter of speculation, which I think the Court cannot enter into. We must assume that the jury gave weight to the direction of the judge and applied their minds to the evidence and law of the case, and if they did that and believed that the three grounds of defence were sustained, they might have been of opinion that £25 was grossly inadequate. Whether their minds would not have been influenced by the inadequacy of that amount is a matter with which we, sitting here judicially, cannot deal. For these reasons, therefore, I think that a substantial injustice and a substantial miscarriage of the proceedings is shown, and I therefore concur in the judgment of the Court.

Solicitors—For plaintiff, *Eggleston, Derham, & Martin*; for defendants, *Mallison, England, & Stewart*.

SUPREME COURT SITTINGS,

(Before a'Beckett J. and a jury of six).

FOLEY v. EGAN.

July 21st and 22nd.

Where a person goes into possession of land as a tenant at will and his occupation is beneficial to himself and not to his landlord, the possession of such person becomes adverse to the owner either from the determination of the tenancy in fact or after the expiration of one year from its inception which is its determination in law and even though each party acts as before and believes his interest in the land to be the same as before, the Statute of Limitations begins to run against the owner from the time of such determination either in fact or in law.

The words "shall be deemed to have determined" in section 23 of the Real Property Act 1890, mean "conclusively deemed."

Where a person is put into the possession of land to protect the interests of an infant a construction trust is created and even though the occupation be beneficial to himself and not to the infant the Statute of Limitations will not run against the infant during his infancy.

This was an action for the recovery of land. The Statement of Claim set out (1) The plaintiff is entitled to possession of all that piece of land being part of Crown allotment 20, section 18, Parish of Keelbundora County of Bourke, commencing on the north side of Burgundy Street, 66 feet 2 inches, east from the eastern side of Main Street, thence northerly 66 feet 10 inches, easterly 201 feet 2 inches along Crown allotment 19, southerly 66 feet, and west along Burgundy Street 201 feet 2 inches to the commencing point and containing one rood and nine perches or thereabouts. (2) One Patrick Foley purchased the said land from one Edward Wadeson in the year 1853. (3) The said Patrick Foley paid all the purchase money for the said land in or about the year 1853. (4) The said Patrick Foley went into possession of the said land as such purchaser in the year 1853 and remained continuously in such possession and of right and as the person claiming to be entitled to the fee simple thereof till his death as hereinafter stated. (5) The said Patrick Foley died on the 18th day of May 1865. (6) The said Patrick Foley died intestate and no rule to administer a grant of administration to his real or personal estate has ever been granted. (7) The plaintiff was at the death of the said Patrick Foley and is now his eldest son and heir-at-law. (8) The plaintiff did not attain the age of 21 years until the 14th day of December 1875. (9) From the date of the death of the said Patrick Foley and for more than 20 years afterwards the plaintiff as such heir-at-law remained by himself or by persons on his behalf continuously in possession of the said land. (11) The defendant Catherine Egan wrongfully claims to be entitled to the said land and has applied and is apply-

ing to bring the said land under the *Transfer of Land Act* in her own name as the owner, and the defendant H. C. A. Harrison, who is the Registrar of Titles, threatens and intends unless restrained by this honourable court to issue to the said defendant a certificate of title to the said land, and the plaintiff claims possession of the land, and an injunction restraining the defendants or any of them bringing or attempting to bring the said land under the *Transfer of Land Act* or from in any way dealing with the said land without the said consent of the plaintiff. Defence:—The said defendants say (1) They are in possession of the premises by themselves. (2) They will object that upon the allegations in the statement of claim more than 10 years elapsed between the time when the plaintiff attained his majority and the date of the commencement of this action. (3) They will also object upon the allegations in the statement of claim that inasmuch as the said Patrick Foley named in the statement of claim died intestate after July 1st 1864 the plaintiff has not shown any legal title to the said premises in himself alone or at all. (4) The defendant Catherine Egan has been in open continuous and uninterrupted possession of the said premises as of right for more than 15 years immediately preceding and up to the date of the commencement of this action.

Reply: The plaintiff to such defence says that (1) He joins issue. (2) He will contend that even if there ever was such possession by the defendant Catherine Egan as alleged in the 4th paragraph of such defence it would not operate as against him during the period of his infancy as stated in paragraph 8 of the statement of claim.

The case was heard before His Honour Mr. Justice a'Beckett and a jury of six. The facts as also the findings of the jury appear in the judgment.

Mr. Weigall appeared for the plaintiff.

Mr. Isaacs (with him *Dr. Madden*) appeared for the defendant. *Mr. Isaacs* on the finding of the jury moved for judgment for the defendants. The defendants are entitled to judgment. When the plaintiff or those on his behalf put Rosanna Foley into possession he told her that she might stay there as long as she liked and that he would not disturb her during her life; that made her a tenant at will and the *Statute of Limitations* began to run at once in her favour. By section 23 of the *Real Property Act* therefore her tenancy terminated in 1866 and as since then the plaintiff has been out of possession even allowing him an extension of time for his then infancy he is too late and his right of action is gone. *In re Allison*, 11 Ch. D. 284; *Locking v. Parker*, L.R. 8 Ch. Ap. 30. When plaintiff put Rosanna Foley into possession he told her he would not disturb her during her life time, so that disposes of any contention that she was in possession as a mere caretaker. *McCracken v. Woods*, 4 V.L.R., 222. And if it be contended that she was the trustee of the plaintiff, a mere verbal trust is not enforceable after 15 years. *Payne v. Jones*, L.R. 15 Eq. 320.

Mr. Weigall in reply.—I submit, as a matter of

pleading, the defendant is not entitled to raise on his pleading the defence that my friend now raises. His present contention is that Rosanna Foley was in adverse possession in 1875, and that the defendants have continued that adverse possession, that is not the adverse possession that is raised on the pleadings, and it is very hard on the plaintiff to allow such a defence to be raised at this stage of the case, because if it had been pleaded he could have met it. Then I say that Rosanna Foley was not a tenant at will. She went into possession under a definite agreement. At any rate she is not a tenant at will under section 23 of the Real Property Act 1890, and I contend that she is not a tenant at will at all. Besides even supposing she was a tenant at will when she went out another person (a stranger) could not walk in and take up her possession as his own. Rosanna Foley's possession was the plaintiff's possession and the adverse possession did not begin until after her death, or at all events during the plaintiff's minority her possession was that of a trustee for the plaintiff, and while she held as trustee for him time did not run against him.

Cur. ad. vult.

Aug. 14.

A'BECKETT, J.—This is an action to try the right to a small piece of land in Burgundy-street, Heidelberg. The plaintiff claims to be owner under a title acquired by possession. His father, Patrick Foley, contracted to buy the land from the legal owner, and went into possession in the year 1853, without obtaining a conveyance. He remained in possession until his death in May, 1865. The plaintiff, his eldest son, was then about 11 years of age. The house was locked up, and the family dispersed at the father's death. The plaintiff was taken charge of by a Mr. Finn. Having observed advertisements of an intended sale of the property by the vendor, it was considered desirable to put some person in to keep possession on behalf of the plaintiff, then supposed to be solely entitled as heir-at-law. Accordingly the key of the house was obtained from a sister who had taken charge of it, and Rosanna Foley, an aunt of the plaintiff, was taken to the ground, given the key of the house, and installed in possession, to protect the interest of the plaintiff. The plaintiff said something to the effect that he would not disturb her during her life, and she did, in fact, remain in possession undisturbed until her death in September, 1881. After her death her daughter and the daughter's husband (the present defendants) went into possession, and remained in possession until the land was taken for railway purposes. In order to obtain £200, the price of the land, the plaintiff and defendant (Catherine Egan) sought to avail themselves of the *Transfer of Land Statute* to make title, and their conflicting claims in the Titles Office have brought them into this court. To strengthen her position, Catherine Egan got a conveyance of the legal estate in the land from the executor of the original vendor. In argument before me both sides have treated this conveyance as valueless, which I think it is. The vendor's title has been defeated by

adverse occupation, and the question is, who has gained the title which he has lost? Though the sum at stake is small, the principles involved are important. The plaintiff has not personally exercised any act of ownership over the land since he handed the key of the house to Rosanna Foley in 1865. It is clear from the evidence that Rosanna Foley, though she always regarded herself as holding by the plaintiff's permission, enjoyed all the benefits to be obtained from ownership. Occasionally she let the land and received rent, and she never accounted to the plaintiff. She always spoke of the land as his, and would probably have given it up at any time if he had asked for it, but he never interfered with her, and her occupation was beneficial to herself, not to him, while it continued. The defendants endeavoured to make out that Rosanna Foley did not obtain possession, as the plaintiff had stated, and that they had been in possession during her life, and in order to settle the contradiction in evidence on these points, I sent the following question to the jury:—"Did Rosanna Foley enter into possession of the property in dispute as caretaker or trustee of the plaintiff and continue in possession as such until her death?" to which they unanimously answered that she did. This question was not intended to define with legal accuracy the relation in which Rosanna Foley stood to the plaintiff. The only effect to be given to the answer is to affirm the truth to the plaintiff's story and to sweep away the false testimony of the defendants. The legal relations of Rosanna Foley and the plaintiff are to be determined by the facts as disclosed by the plaintiff's evidence. It was contended for the plaintiff that the possession of Rosanna Foley was his possession, and gained a title for him, that possession adverse to him did not begin until after the death of Rosanna, when the defendants entered, or, at all events, that during his minority the possession of Rosanna was as his trustee. For the defendants, it was contended that Rosanna Foley was tenant at will of the plaintiff; that under the provisions of section 23 of the *Real Property Act 1890* her tenancy determined in 1866, and that, as since then he had been out of possession, allowing him an extension of time by reason of his then infancy, he was too late to bring an action to recover the land. Section 23 provides that when any person shall be in possession of any land as tenant at will the right of the person subject thereto to make an entry or bring an action to recover such land shall be deemed to have first accrued either at the determination of such tenancy or the expiration of one year next after the commencement of such tenancy, at which times such tenancy shall be deemed to have determined. English decisions of the highest authority on the construction of this section lead to strange results. They decide that the tenancy if not determined in fact before a year from its inception is determined in law by the expiration of the year, so that though the holding may in fact continue unchanged for a series of years, during which each party acts as before and intends and supposes his interest in the land to be the same as before the tenancy has

no legal existence after the first year. See *Goody v. Carter* 9 Q.B. 863; *Day v. Day* L.R. 3. P.C. 751. The section says that the tenancy is to be deemed to have determined at the end of a year, and but for the decisions to the contrary I should have thought that "deemed" did not mean conclusively deemed, and that on distinct proof, as in this case, that the relations of the parties continued unchanged after the year the tenancy would be held to continue until its actual determination. It seems, however, that the operations of the Statute will not be prevented by the actual continuance of the tenancy, but that written acknowledgment of title, or the creation of a new tenancy, is necessary to keep alive the owner's rights. In some cases juries have inferred the creation of a new tenancy, as in *Turner v. Bennett*, 9 Mees. and Wels., 643. In the present case the inference has not been drawn, nor would the facts have warranted it. In *Allan v. England*, 3 F. and F., 49, where permissive occupation continued for more than 20 years, the owner's rights were saved by his coming on the land occasionally, and giving directions which were equivalent to taking possession. Here, though the plaintiff visited the land at long intervals, he did so as the guest of Rosanna Foley, not in exercise of any right of ownership, and the jury have found that her possession was unbroken. If therefore her possession is to be regarded as having been throughout merely that of a tenant at will to the plaintiff, I should be constrained to hold that time had run against the plaintiff from the year 1866, and that this action was barred by the Statute. I have, however, to consider the authorities cited to show that Rosanna Foley is to be regarded as having been a trustee for the plaintiff during his infancy, and that while she held as such trustee time did not run against him. I think they support this contention, and that the constructive trust excludes the operations of the Statute, not merely with respect to the right to an account of rents, but also with respect to an action to recover the land. See *Thomas v. Thomas*, 2 K. and J. 83, *Pelly v. Bascombe*, 4 Giff. 390, and *Quinton v. Frith*, Ir. Rep. 2 Eq. 396. In coming to this conclusion I am not holding Rosanna Foley to be a trustee merely because the jury have called her one. I treat her as a trustee for the plaintiff during his infancy within the meaning of the authorities above referred to by reason of her entry and possession having been by his procurement and to protect his interests as she clearly understood and frequently acknowledged. Subject to other rights which might have arisen if administration had been taken out to his father's estate, he, as heir at law of his father, was entitled to the land (see *Larkin v. Drysdale*, 1, V.L.R., 1, 164), and she entered for him. Her fiduciary position was not destroyed by his making and keeping a promise not legally binding to leave her undisturbed. I therefore hold that time did not run against the plaintiff until his coming of age on the 14th of December, 1875, and as the writ was issued on the 5th of November, 1890, the action is not barred. Some years before he came of age the plaintiff had acquired title to the land by succeeding his father in

occupation and completing the 15 years which had begun to run against the legal owner when his father took possession in 1853. I therefore hold the plaintiff to be entitled to the land. I give judgment for the plaintiff, restraining the defendants Egan from bringing or attempting to bring the land under the *Transfer of Land Statute* and giving him his costs against the same defendants.

Solicitors for the plaintiff, *Madden & Butler*;
Solicitor for the defendants, *Mills*.

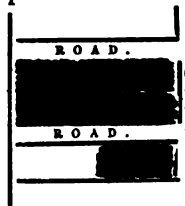
(Before Hood, J.)

WARNER V. HANN & ANOTHER.

Sept. 2.

Real Property Act, 1890, ss. 19, 31, 32. *A brought an action for the recovery of land from B. The land was conveyed to A on November the 24th, 1860. The writ in the action was issued in March, 1891. A has always lived beyond the seas and never went into possession or exercised any act of ownership over the land. B went into adverse possession of the land in 1874. Held under ss. 19, 31 and 32 of the Real Property Act, 1890, that A's title to his land was extinguished after 30 years from the date of his conveyance, and that his action was too late. Held also that B was entitled to the land.*

This was an action for the recovery of land. The statement of claim was as follows: The plaintiff says 1. He is entitled to the possession of all those pieces of land, being parts of crown allotment B section twenty five, parish of Dandenong, County of Bourke containing one hundred acres, one rood, and ten perches or thereabouts, being the lands coloured black



on the plan in the margin hereof together with rights of carriage-way over the roads shown in the said plan, which lands and roads are comprised in and set forth in the certificate of title entered in the register book, vol. 2294 fol. 458799 in the name of the

plaintiff. (2) The plaintiff is by virtue of the certificate of title mentioned in paragraph one hereof seized of an estate in fee simple in the said lands. (3) The defendant Hann is by the defendant Greaves wrongfully in possession of the said lands and has neglected and refused to deliver up possession thereof to the plaintiff though required so to do by notice in writing dated the sixth of January 1891.

The defence was as follows:—The defendants say that (1) The defendant Ferdinand Bond Brown Sharland Hann is in possession of the said land by his tenant James Greaves the above-named defendant. (2) The defendant James Greaves is in possession of the said land as tenant of Ferdinand Bond Brown Sharland Hann the above-named defendant.

The reply was as follows: The plaintiff says that (1) he joins issue.

At the trial the plaintiff was allowed to amend his reply by adding that the plaintiff became entitled to the said lands and to the possession thereof on or about the 24th day of November 1860, and was then and has ever since been absent from the Colony of Victoria. To this the defendants were allowed to rejoin that the defendants will object that upon the allegation in the amended reply even if the same be true the plaintiff is not entitled to possession of the premises inasmuch as upon such allegations his title and right of entry in respect thereof have been destroyed and lost by reason of the provisions of Part II of the *Real Property Act*, 1890.

The plaintiff in this action has never been in the Colony. On the 24th November 1860 he bought the land in dispute and obtained a conveyance to himself from a Mr. Charles Mould. And in October 1890 he had the land brought under the operation of the *Transfer of Land Act*. The plaintiff never took actual possession of the land in any way. Up till the year 1878 the land remained open land and any one and every one used it. In that year the defendant took possession of it and in the following year he fenced it in. The date of the writ in this action was March 1891.

Mr. Hayes for the plaintiff.

Mr. Goldsmith and *Mr. Anderson* for the defendants.

Mr. Goldsmith. I submit the defendant is entitled to judgment. The statute has run against the plaintiff. The Statute began to run against him immediately his right of entry accrued and that was when he got his conveyance in November 1860. The Statute is clear that his right to the land is gone. He has never exercised any act of ownership over it. *Pearson v. Russell*, 14 V.L.R. 867; *Trustees Executors and Agency Company Limited v. Short*, 13 Ap. Cas. 793. The Legislature showed by passing the *Real Property Amendment Act* No. 873, incorporated in the present section 19 of the *Real Property Act* 1890, that if the land is not used for a certain time the title is gone. *May v. Martin*, 11 V.L.R. 562. We have proved that we have been in possession for fifteen years and that the plaintiff has been out of possession for thirty years therefore I submit we are entitled to succeed.

Mr. Hayes.—I submit that the defendant have not shown continuity of possession, besides 15 years will not give the defendants a title unless it is shown that, we come under no disabilities. Our case falls within the first part of section 19 of the *Real Property Act* 1890. Shall have been in possession does not mean in actual possession, but entitled to possession. *Shelford's Real Property Statutes*, 8th edition, p. 155. This case is governed by *Solomon v. Jarvis*, 12 V.L.R. 878. Since plaintiff has always been absent from the colony he has 30 years from the time when his right to bring an action first accrued, and I submit his right to bring an action did not accrue until the defendant went into possession, up till then there was no one to bring the action against. [HOOD, J.: There would be some force in

your argument if you could bring your case within the first clause of sec. 19]. I submit there is evidence that we have been in possession, by the fact that Mr. Weir, under instructions from our agent, went out and examined and made a report on the land. This being so I submit we have 30 years from our right to bring the action. *Smith v. Lloyd*, L.R. 9, Ex. 562, shows that clearly. I submit, therefore, that the plaintiff is entitled to judgment.

MR. JUSTICE HOOD.—This is an action for ejectment. The plaintiff in the first instance relies upon a certificate of title which shows that he is the owner in fee simple of the land in dispute. Defendant has pleaded under the rules that he and his tenant are in possession, and by those rules the defendant is entitled under that defence to set up any legal defence that he can find available. His first defence is adverse possession, and though that defence is not a very meritorious defence, I am not here to decide the action from its moral but from its legal aspect, and I find as a fact that the defendant has been in adverse possession of the land for 15 years prior to the date of the action. He has fenced the land, he has grazed his cattle upon it, and has cut timber off it. It is true that there was a gate upon it, but all the evidence shows that the defendant intended to, and did, in fact, assert a claim to the land, and that being so, I think that he has succeeded on the claim as it originally stood. But the plaintiff has amended his reply, and he now alleges that he became entitled to the said land and to the possession thereof on or about, the 24th of November, 1860, and that he was then and ever since has been out of the Colony of Victoria. As that stands it disposes of the plaintiff's argument, because it is admitted that the cause of action arose in November, 1860, but I do not think that the plaintiff should be bound strictly to that, but that he should be allowed to raise the argument that he has been in possession since 1860 by means of agents; but on the evidence I am unable to find that he ever did take possession. The only evidence of his ever taking possession is that a Mr. Weir was sent out to the land by a Mr. Mould, whom the plaintiff alleges to have been his agent, to advertise the place, and to advertise for tenders with respect to the leasing of it. I think very little of the merits of the defendant's case, but I do not think much more of the plaintiff's. It seems to me with respect to Mr. Weir's action, that instead of taking possession of the place, the plaintiff was merely making inquiries about the land as to what its value was, and whether it was worth anything at all, and I find as a fact that he did not take possession of the land at any time. As I also find that the plaintiff has always been absent from the colony, that throws the plaintiff's case back on to sections 19, 31, and 32 of the *Real Property Act* 1890. Section 31, as qualified by section 32, are the sections that govern the plaintiff's case, and these two sections give him 30 years from the time when his right to make an entry first accrued. The time at which his right first accrued is provided for by clause 3 of section 19, and that time is the time at which he first became entitled. He became entitled on the 24th of

November, 1860, and as the writ in this action was not issued until March, 1891, I think that he is too late, and there will be judgment for the defendant. On the question of costs I do not, as I have said, consider that the defence is a very meritorious one, but neither do I think that the plaintiff has any great merits, and as I cannot see any reason why I should depart from the ordinary course, I will enter up judgment for the defendant, with costs.

Solicitors for the plaintiff, *Sims*. Solicitors for the defendants, *Anderson & Son*.

IN CHAMBERS.

(Before Higinbotham, C.J.)

LEW KIM V. McLENNAN AND ORS.

2nd October.

County Court Act 1890, (No. 1078) sec. 51—Visible means—Remission to County Court—The primary obligation of satisfying the judge that the plaintiff has no visible means lies upon the party making the application—Where in an application under Sec. 51 of Act No. 1078 the defendant in his affidavit baldly swore that the plaintiff, if unsuccessful, had no visible means of paying the defendants' costs, and the plaintiff as baldly swore that she had such means. Held, that the defendant had not satisfied the judge that the plaintiff was without visible means.

Application under sec. 51 of the *County Court Act 1890* on behalf of defendants to remit the action to the County Court.

The affidavit filed in support stated that:—

3. The plaintiff is a married woman living apart from her husband.

4. The plaintiff has no visible means of paying the costs of the defendants should a verdict be not found for her.

The plaintiff in her answering affidavit stated:—

3. I am a married woman but I am not living apart from my husband.

4. I have visible means of my own of paying the costs of the defendants should a verdict be found for the defendants.

Mr. Gill in support. *Williams, J.*, in *Taylor v. Port* 10 V.L.R. (a) 300 decided that "If on the return of the summons the plaintiff can show that he has visible means or the judge is not satisfied that he has not *cadit questio* the matter ends, and the summons is dismissed." The plaintiff in this case must satisfy the judge that she has visible means, the mere bald statement that she has visible means is not sufficient. The onus is on her. The means of knowledge as to means is entirely in the plaintiff and she should show some facts from which the judge can arrive at the conclusion that she has visible means.

Mr. Anderson to oppose. In *Taylor v. Port* as reported in 6 A.L.T. 129 it appears the affidavit in support was in the same bald form as to means as the affidavit in support in the present case and the answering affidavit merely stated that the plaintiff was a surgeon and had been carrying on his profession for the last 17 years. *Williams, J.*, in giving judgment

said "The defendant to show me that the plaintiff has no visible means as are mentioned in this section, has filed an affidavit, which baldly states a conclusion of fact in the terms of the section, but states not one single premise to show me that he was warranted in swearing to that conclusion. Had this affidavit not been answered I might have been satisfied, but it is answered sufficiently to throw the onus on the defendant of setting forth the particular grounds on which he based his conclusion of fact." In *Heise v. Dewing* 7 A.L.T. 72 the affidavit was in a similar form as the present, there was no answering affidavit, and *Williams, J.*, in delivering judgment said "If he (the plaintiff) leaves an affidavit stating that he has no visible means uncontradicted, I think it may be taken that the affidavit is true." These cases show that where the defendant shows in the first instance facts from which the judge can infer that the plaintiff has no visible means the onus is cast on the plaintiff to prove that he has visible means, but if the defendant contents himself with a bald statement that the plaintiff has no visible means and the plaintiff as baldly denies that statement the onus is cast upon the defendant of proving that the plaintiff has not the means. As the affidavits stand a judge could not be satisfied that the plaintiff was without visible means. The application should therefore be dismissed.

His Honor said:—I think the primary obligation rests upon the party who makes the application, to show that the case comes within the conditions laid down by the Act. In this case primarily the defendants are called upon to satisfy the Court that the plaintiff, if unsuccessful, has no visible means of paying the defendant's costs. In many cases, indeed, in the majority of cases, the person making the application, is not likely from personal knowledge to be in the position to give particulars, which would be conclusive proof, that the other party has no visible means. Then what is the position of the parties when a defendant comes forward with an affidavit like this, in support of the application. There is a statement here, on which the defendant partly relies, that the plaintiff is a married woman, living apart from her husband; now this is met with an absolute denial, and this is a question upon which I should accept the denial of the party against whom it is made. It is true that the plaintiff meets the statement about her visible means with a statement equally vague and unsatisfactory. I think the case of *Taylor v. Port* lays down what the practice should be in cases of this kind. If on the return of the summons the plaintiff can show she has visible means, or the judge is not satisfied that he has not, summons will be dismissed. Now the plaintiff has not shown that she has visible means; she meets the bald statement that she has not with a statement equally bald, that she has visible means, it is a statement which she ought to be able to meet with some satisfactory proof. This case is one in which the affidavits on both sides leave the judge in a state of uncertainty. I have not the slightest means of judging whether the plaintiff has or has not visible means, but I am not satisfied that she

has not visible means. The defendants case leaves me in that uncertain state of mind, an uncertainty which is increased by the fact, that another statement is met with a possible denial. I think, that, if the party making the application, leaves the judge's mind in a state of doubt, that party fails for the primary obligation of satisfying the judge, that the plaintiff has no visible means, undoubtedly lies upon the party making the application. I think the defendants have not satisfied me that the plaintiff has no visible means, and I will follow the practice laid down in *Taylor v. Port*, and dismiss the application. Owing to the unsatisfactory character of the affidavits on both sides, I will allow no costs. I certify for counsel.

Solicitor for plaintiff, *Watson*; for defendants, *Gill*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., a'Beckett, and Molesworth J.J.).

MUSGROVE V. MITCHELL.

Aug. 12, 18.

Marine Act 1890, s. 13—Master—Beneficial owner—Locus standi. The "master" in the 13th section of the Marine Act 1890, means the person who was the master at the time the vessel first became an obstruction to the navigation of the port.

In a proceeding before Justices under the 13th section the beneficial owners of a ship have no locus standi.

Order to review an order of justices.

[The facts and arguments are set out in the judgment].

Mr. Mitchell appeared to move the order absolute.

Mr. Box and *Mr. McIntyre* appeared to show cause.

Cur. ad. vult.

HIGINBOTHAM, C.J.—Order to review an order of justices made on April 18, 1891, directing the issue of a warrant for the removal of the wreck of the ship *Cape Verde* in such manner as the port officer should direct. The *Cape Verde* was wrecked by collision with another vessel on June 23, 1889, and sunk in the fair way of Port Phillip Bay, causing an impediment to the navigation of the port and obstructing the entrance to Hobson's Bay. On February 23, 1891, the complainant served a notice upon Captain Mitchell who had been the master of the *Cape Verde* at the time of the collision, requiring him in accordance with the terms of section 13 of the *Marine Act, 1890*, to clear the port of such ship and every part thereof within 14 days from the day of the receipt of the notice, and on March 7 a further notice, dated the previous day, requiring Captain Mitchell to give security to the satisfaction of the complainant as port officer for the removal of such ship and the wreck within a further time of 24 hours from the date of the expiration of the first notice. The order to review the order of justices has been granted on five grounds. The first ground is that there was no evidence that

the owners of the *Cape Verde* had been required by notice in writing to clear the port of the said ship, or to give security for the removal thereof, in accordance with the provisions of the 13th section. The answer to this objection is, that the act does not require the owner, but the "owner or master" to be served with notice. The *Cape Verde* was not registered in Victoria, and the registered owners at the time of the casualty are now resident abroad. In such a case it would be more convenient to notify the master if he should be found within the jurisdiction. The act allows notice to be served on either the owner or the master. The second ground of the order to review is that Captain Mitchell upon whom the notices were served, was not the master of the wrecked vessel within the meaning of the act. It has been contended that the word "master" in the 13th section means the master of the vessel at the time of the notice, and that as Captain Mitchell states that he ceased to be master of the *Cape Verde* on June 23, 1889, and afterwards abandoned the vessel, no notice has been served on the master of the vessel, and the justices consequently had no jurisdiction to make the order. We are of opinion that the "master" in the 13th section means the person who was the master at the time the vessel first became an obstruction to the navigation of the port. The object of the section is to provide speedy means of clearing the port of the wreckage, and at the same time, and so far as may be consistent with that primary and necessary object, to give the legal owner of the wrecked vessel a reasonable opportunity of recovering his property. The master of the vessel at the time of the loss represents the absent owners, and it is proper that he, being on the spot, should be liable to be called on at once to take steps to protect his employer's interests by removing the ship and the cargo. The primary object of this section would be liable to be defeated if the master of a vessel registered abroad could, by resigning his position as master and abandoning the vessel, prevent and delay the removal of a wreck that impeded, or, it might be, endangered, the navigation of the port. The third and fourth grounds of the order to review raise the objection that the notices served on Captain Mitchell in this case did not fix a reasonable time for clearing the port of this ship, nor a reasonable further time after the expiration of the first notice for the removal of the ship. This objection was not taken before the justices. Evidence was given that 14 days was not a reasonable time within which to raise the vessel, but no evidence was given before the justices that 14 days would not be a reasonable time within which to clear the port of such ship and of every part of the wreck thereof. By the 13th section, the time within which the port is to be cleared of the ship and the wreck, and the further time for removing the ship and wreck, are the time required and the time appointed by the port officer, the harbour master, or, in their absence, the proper officer of Customs of or at such port. Assuming that such officers are bound to fix reasonable time for the acts required to be done, it is manifest that in determining that

question they must have regard to other considerations besides the time reasonably necessary for raising the ship and saving the cargo. Their primary duty is to clear the port of an obstruction to navigation, and the degree and character of that obstruction may be such as to make it perfectly reasonable to fix a time for the removal of the ship within which the ship could not be raised, nor removed except by totally destroying it and the cargo contained in it. Without saying that the exercise of the discretion of the responsible officer on this point could not under any circumstances be the subject of review, it is clear that it would only be where manifest injustice had been unnecessarily occasioned by the appointment of too short a time that the discretion of the officer could not be overruled. In this case 18 months were allowed to the persons interested in the ship and cargo to remove them, and two attempts had been made recently to do so without success. It would be impossible to contend under those circumstances that the port officer was not justified in applying for the necessary authority to remove the ship and the wreck himself without further delay. The fifth ground of the order to review was that Mr. Hugh Thomson, one of the beneficial owners of the ship had no opportunity afforded to him of proving that the times mentioned in the two notices to Captain Mitchell were not reasonable times within which to do the acts mentioned in the notices. The justices were right, in our opinion, in holding that the beneficial owners of the ship had no *locus standi* or right to be heard in the proceedings before justices. The objection as to time, which was not taken, and which, if it had been taken, could not have been supported by the master, cannot be entertained on the application of a person who is a stranger to the proceedings. The objections to the order of the justices have failed upon all the grounds. The order to review will therefore be discharged with costs against Captain Mitchell and Mr. Hugh Thomson, on whose application the order to review was granted.

Solicitors in support *Braham and Pirani*; to oppose *Crown Solicitor*.

SUPREME COURT SITTINGS.

(Before Hood, J.)

ROBERTS V. BALFOUR AND ANOTHER.

Aug. 12 & 13.

Defective title—Compensation. A., as trustee under the will of B., sold a piece of land, part of the estate, to C. The contract of sale contained a condition that all requisitions on title were to be made within 14 days from the date of the sale, otherwise all objections to the title were to be deemed waived. A. produced the documents of title in his possession, which showed in him a clear title to the whole of the land. C., being satisfied, paid the whole of the purchase-money, taking a receipt for the same, but he did not take a conveyance of the land. Subsequently, it was

discovered that part of the land had been conveyed away by B. during his life-time, and that such deed of conveyance had been registered. Held that C. was entitled to recover from A. compensation to the value of the land to which A. was unable to give title. Where a vendor is desirous to limit the liability under which he usually rests, of making good title to land which he is selling, he must do so in terms explicit, plain, and unambiguous.

Where a partial failure of title is discovered before conveyance the Court may enquire into all the circumstances, and may award compensation to the purchaser according to the real state of the case.

This was an action by the plaintiff against the defendants for having sold the plaintiff a block of land, to part of which they were unable to give title, and the plaintiff claimed £500 damages or compensation. The defendant Balfour is one of the executors under the will of one James Phillips, and the defendant Company is the executors of the will of one William Templeton, who during his life was a co-executor with the defendant Balfour under the will of the said James Phillips. On the 13th of November 1887, the defendant Balfour and Templeton, acting under the will of the said James Phillips, put up for sale by public auction part of his estate, and the plaintiff became the purchaser of lot 5 for £1,025, payable as follows:—£256 5s cash, and the balance on three bills each for £256 5s., payable at 13, 25, and 37 months. Both at and before the sale plans of lot 5, the lot purchased by the plaintiff, were exhibited by the agent of the vendor, showing that this lot had a frontage to Stevedore Street of 68ft. 11½in., and a frontage to Melbourne Road of 147ft. 10in., and it was described in the particulars of lots attached to the contract of sale as follows:—"Lot 5. Part of Crown Suburban Allotment 9, portion 2, parish of Cut Paw Paw, containing about 1 acre 1 rood 37 7-10 perches, having a frontage to Stevedore Street of 68 feet 11½ inches and the Melbourne Road of 147 feet 10 inches, and being irregular in shape." In due course the plaintiff asked to see the title, and the defendant and Templeton produced all the documents that they had in their possession, or of which they had knowledge of, and these documents showed a perfectly clear title in the defendants, and the plaintiff consequently made no objections to the requisitions on the title. On the 16th of April, 1890, the plaintiff paid the whole of the purchase-money, but did not take a conveyance of the land which was under the old law, but he took a receipt for the purchase-money instead, as he intended, to bring the land under the Transfer of Land Act. The following is the receipt given by the defendant and Templeton which was endorsed on the back of the contract. "The undersigned James Balfour, and William Templeton, as the trustees of the within mentioned will, do hereby acknowledge to have received of and from Wm. Henry Roberts, of Chancery Lane, Melbourne, Solicitor, the whole of the purchase money, amounting to the sum of £1,025, agreed to be paid by him to them, as the purchase-money, for the whole of lot 5 described in the written

contract, and being part of allotment 9, portion 2, parish of Cut Paw Paw, containing 1 acre 1 rood and 37 $\frac{7}{10}$ perches, or thereabouts, having a frontage to Stevedore-street of 68 feet 11 $\frac{1}{2}$ inches, and 147 feet 10 inches to Melbourne-road, Williamstown." Nothing more was done until the 29th of July 1890, when the plaintiff on endeavouring to bring the land under the Transfer of Land Statute, discovered that part of the land, that fronting Stevedore Street, had been conveyed away by James Phillips, in his life time, to one Thomas Pierce, in the year 1870. Plaintiff at once wrote to the defendants informing them of the fact of his discovery of this conveyance, and asking for a return of part of the purchase-money, but the defendants refused to return any part of the purchase-money, and the plaintiff then brought this action. The defences set up by the defendants were, first, that the ordinary rule as to giving compensation for deficiency did not apply, as the defendants were only trustees, selling whatever title they might have; secondly, that even if they had intended to make title at the time of the sale, they were now relieved from such obligation by the 5th condition of the contract, which provided that all objections or requisitions to or on the title were to be delivered in writing within 14 days from the day of sale, and all such objections or requisitions not so delivered were to be deemed absolutely waived and the plaintiff made no such objections or requisitions; thirdly, that inasmuch as this deed of conveyance of 1870, from Phillips to Pierce was registered, the plaintiff could have discovered it for himself, and therefore, the rule *caveat emptor* applied.

Mr. Topp, and Mr. Weigall, appeared for the plaintiff.

Mr. Higgins, appeared for the defendants.

Cur. ad. vult.

Sep. 7.

Mr. Justice HOOD—By a contract in writing dated the 15th day of November, 1887, the plaintiff, William Henry Roberts, purchased from John Buchan & Co., as agents for the vendors, for the sum of £1,025, certain land described as "part of Crown suburban allotment 9, parish of Cut-paw-paw, containing 1a. 1r. 37 $\frac{7}{10}$ perches, having a frontage to Stevedore-street, of 68ft. 11 $\frac{1}{2}$ in. and to the Melbourne road of 147ft. 10in., and being irregular in shape." The sale was by auction, and before and at the time of the sale plans were exhibited on the vendor's behalf showing that this lot was bounded both by Stevedore-street and the Melbourne-road, and the plaintiff bought under the belief, induced by the description and the plans, that he was buying land having a frontage to both streets. The vendors were James Balfour and William Templeton, as trustees of the will of James Phillips, deceased, and they received from the plaintiff the whole of the agreed purchase money, and on the 23rd April, 1890, they signed a receipt therefor. Shortly after the purchase the vendors' solicitors produced to the plaintiff the title to the property. This title was under the old system, and showed a complete right in Phillips to the land sold, and the plaintiff being content made no object-

ions or requisitions. After payment of the purchase money, but before any conveyance was executed, the plaintiff discovered that, in 1870, Phillips had sold all the Stevedore-street frontage, and had duly executed a conveyance thereof to the purchasers in whose assigns the title and possession now remain. Of this fact the executors of Phillips were in ignorance at the time of the sale and receipt of the purchase money, and they sold in *bona fide* belief that the whole of the land was theirs to sell. Under these circumstances the plaintiff commenced this action claiming damages or compensation, and, though not so put in his pleadings, his case was argued upon the principle that a purchaser is entitled to have all the vendor can convey with compensation for deficiency, if any, unless there is some condition in the contract to the contrary. To this the defendants say, first, that the rule does not apply in the present case, as they were only trustees selling whatever title they might have. So far as this part of the defendant's contention is concerned, there is no express statement anywhere that they were selling their right, title, and interest only. The contract was made by John Buchan & Co. as agents for the vendor, and the sale was by order of the Trustees, Executors and Agency Company Limited, on behalf of the trustees of the will of James Phillips, deceased, and the only other reference to the position of the defendants is in condition No. 10, which states that the vendors, being trustees, will only enter into the usual covenant, that they have not encumbered the property. There is nothing in this to support the argument that at the time of the sale it was not intended that title should be made. On the contrary, it is clear from the surrounding circumstances and from the contract and conditions of sale, that, when they sold, the vendors believed they could give a good title, and intended to do so. The defendants, however, further say that even though they may at the time of the sale have intended to make title, yet they are now relieved from their obligation by reason of the conditions, and especially by condition No. 5. The condition reads thus:—

"Condition 5.—All deeds and documents in the possession of the vendors relating to the title to the property bought by each purchaser shall be produced to such purchaser or his solicitor for inspection upon his making application for the same to the vendor's solicitors, Messrs. Malleison, England & Stewart, Queen-street, Melbourne, within four days, and the purchaser shall within fourteen days from the day of sale deliver to the vendors' solicitors a statement in writing of all objections or requisitions (if any) to or on the title, and all objections or requisitions not included in such statement shall be considered as absolutely waived, and such purchaser shall be considered as having accepted the title."

Under this condition, the vendors having produced for the inspection of the plaintiff all deeds and documents in their possession relating to the title and the plaintiff having made no objection or requisition within the stipulated time, it is contended on behalf of the defendants that the plaintiff must be taken to have accepted the title whatever it was, and to have waived all objections, no matter what their nature might be. Indeed, it was broadly urged that even if the deed of 1870 had conveyed away all the land, instead of part

only, still the defendants would be entitled to retain the whole of the purchase money and give the plaintiff in return nothing but a valueless conveyance. This seems a startling conclusion, though, of course, if it is the correct construction of the contract, effect must be given to it. But it must be remembered that in cases like these the burden is on the vendor. If he desires to limit the liability under which he usually rests of making good title to the land which he sells, he must do so in terms explicit, plain and unambiguous. (*Ellis v. Rogers*, 29 Ch. D. 661, *re Marsh*, 24 Ch. D. 17). The conditions of sale are prepared by him. He knows or ought to know much more of their subject matter than a purchaser usually knows or can know, and where the language which he uses is at all ambiguous it is always construed in such a way as to prevent the vendor from dealing unfairly with the purchaser. (See *re Terry*, 32 Ch. D. 28). Now does this condition, No. 5, or any other in this contract say plainly or by necessary implication that the vendor is not bound to make a title at all unless required to do so within the stipulated time, or is it anywhere conveyed to a purchaser's mind that he may have to pay his money and get nothing for it, I can discover nothing of the sort. The fair interpretation of the contract and conditions in my opinion is this. The vendors sell the land, and undertake to make title, and give a conveyance. They have in their possession deeds and documents which show good title, and these will be produced. If there is anything wrong with these deeds or documents the purchaser must make objections and requisitions, and if he makes any requisition which the vendors are unable or unwilling to remove or comply with the contract may be annulled. The vendors are bound to make title, but if no objections are made the purchaser may have to accept an infirm title, or possibly merely a possessory one. Beyond this I cannot think that the conditions go, nor can I read them to mean that the purchaser is not to get the land which he bought and paid for, nor any title of any sort to it, but only a mere waste piece of parchment containing idle covenants. It was, however, further urged as an answer to the plaintiff's claim that inasmuch as this deed of 1870 appears to have been registered, the plaintiff could have discovered it for himself, and, therefore, the doctrine of *caveat emptor* applies. The strongest case in support of this view is *Clare v. Lamb* (L.R. 10 C.P. 334). The question there was, "Whether the purchaser, having paid £240 for property to which the vendors had no good title could recover back that sum." It was held that he could not, as the doctrine of *caveat emptor* applied. Grove, J., in giving judgment said:—

"If a man goes into a shop to buy a chattel, the seller, especially if he be the manufacturer, must necessarily know more of the nature and quality of the article than the purchaser can. In that case the rule *caveat emptor* is often a hard one, and yet it generally applies. In the case of the purchase of an interest in land, the person who sells places at the disposal of the buyer such title deeds as he possesses, and under which he claims. The purchaser has full opportunity for investigating the title of the vendor, and when he takes a conveyance he is assumed to have done so. Considerable in-

convenience might result if this were not so. Conveyancers may agree upon the title, and long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the money by reason of some defect, of which he had no notice at the time."

If the reference in the foregoing extract to the sale of a chattel is intended to imply that in such a case there would be no warranty of title, I should doubt the correctness of the statement (see *Morley v. Attenborough*, 3 Ex. 550, *Eichholtz v. Bannister*, 17 C.B., N.S. 798); and so far as it lays down any general rule as to the application of the maxim *caveat emptor*, it is much too wide (*Jones v. Junt*, 1 L.R. 3, Q.B. 197). If the decision is to rest upon the ground of inconvenience, I must confess myself unable to understand why it should be deemed inconvenient to make a man refund money received by him upon a consideration which he has failed to perform, to say nothing of the manifest injustice of such a proceeding. But this decision and all others of a similar character (whether they are based, as some are, upon an application of this maxim, or, as others are, and as I think more properly, upon the doctrine of merger) are clearly distinguishable from the present case. They are all cases of defects discovered after completion and execution of the conveyance, and a marked distinction has been drawn between them and cases like this where the mistake is ascertained before the final act. "Although the purchaser has paid the money, yet if he is evicted before the conveyance is executed by all the necessary parties he may recover the purchase-money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered" (*Sugden's Vendor and Purchaser*, 14 Ed. 549). And where there has been only a partial failure of title discovered before conveyance, "a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction" (*Johnson v. Johnson*, 3 B. & P., 170; *Cripps v. Reade*, 6 T.R. 606). This view seems to me to apply to the present case, and I accordingly propose to follow it. Much was said about the possible hardships upon the defendants if the plaintiff were allowed to recover, inasmuch as the defendants may have distributed the assets of the estate. Even if this were so, and even if they had no remedy over against the persons who have received the assets, still I should say that they must bear the loss. They took upon themselves to sell land as their own to which they had no title, when it was as much open to them as it was to the plaintiffs to search the registry, and as between the two innocent parties it seems to me just that they should suffer. It was also urged in argument that if this objection to title had been taken in time the defendants might have cancelled the contract under the powers given by condition No. 7. In that event they would have had to return the purchase-money, and it has not been contended that they desire now, or ever did desire, to get rid of the agreement, or that they could gain anything by so doing.

It was admitted during the hearing that the trustee company had been wrongly joined as co-defendants. They will be struck out, and the plaintiff must pay any extra costs occasioned by the mis-joinder, and there will be judgment for the plaintiff against the other defendant, with costs, for £100, that being, in my opinion, a fair compensation for the loss sustained. I have dealt with this case throughout apart from the pleadings, but upon the points raised and argued as the matter proceeded.

Solicitors for the plaintiff, *Pentland, Roberts & Thompson*; solicitors for the defendants, *Malleson, England & Stewart*.

(Before Webb, J.)

GUEST v. WATSON.

Sept. 4th.

A plaintiff cannot bring an action for the specific performance of a written agreement with a parol variation. Where a plaintiff brings an action for the specific performance of a written agreement with a parol variation, and sets up a part performance in order to take the case out of the Statute, that part performance, in order to entitle him to succeed, must be referable only to the parol variation, and must be a part performance by himself and not by the defendant.

This was an action for the rectification of a written agreement and specific performance of the agreement when rectified. The Statement of Claim set out (1) On and prior to the 3rd of April 1890 one Sarah Jessie Guest was the registered proprietor under the *Transfer of Land Statute* of the lands comprised in Certificate of Title Vol. 2151 Fol. 430,110, subject to a registered Mortgage for £4300; (2) On and prior to the said date the defendant was the registered proprietor of the lands comprised in Certificate of Title Vol. 2105 Fol. 420,800; (3) On or about the said date it was agreed between the said Sarah Jessie Guest and the defendant that the said Sarah Jessie Guest should exchange the lands first mentioned subject to the said Mortgage for part of the lands secondly mentioned, comprising 35 acres. (4) In pursuance of such agreement a memorandum under seal was prepared and executed by the said Sarah Jessie Guest and the defendant, which by reference to a plan in the margin thereof showed the 35 acres of the defendant's land which the said Sarah Jessie Guest was to receive in exchange, and then provided thus "the said Sarah Jessie Guest, in consideration of this agreement by the said John Ralph Watson hereinbefore contained hereby agrees to transfer to the said John Ralph Watson in the said month of January 1891 all that piece of land being lots 16 and 17 on the plan of the Railway Reserve, Camberwell, having a frontage of 132 feet to the Prospect Hill road by a depth of 135 feet to the Railway Parade together with the buildings erected thereon, and the said John Ralph Watson

agrees to pay the interest which may become due on the Mortgage for £4300 now existing on the said land and premises from the date of this agreement." (5) The said recited provision of the said agreement should have been for the transfer by the said Sarah Jessie Guest to the defendant of the said land subject to the said Mortgage, but by the mutual mistake of the said parties or their advisers such provision was omitted. (6) Immediately after the said agreement the said Sarah Jessie Guest went into possession of the said 35 acres, and the defendant went into possession and into receipt of the rents and profits of the said premises of the said Sarah Jessie Guest and has since kept down the interest on the said Mortgage for £4500. (7) The said Sarah Jessie Guest died on the 23rd of April 1890 leaving a will, whereby she appointed the plaintiff her executor, and probate of the said will was granted to the plaintiff on the 28th of June, 1890. (8). The plaintiff as such executor has been in possession of the said 35 acres since the death of the said Sarah Jessie Guest. (9). The plaintiff has always been ready and willing, and is now ready and willing, to carry out the said agreement by transferring the said first mentioned premises to the defendant, subject to the mortgage, upon the defendant executing to him a proper transfer of the said 35 acres freed from encumbrances, but the defendant refuses so to do unless the plaintiff transfers the said first mentioned premises freed from the said mortgage.

The plaintiff claims: (1). That the said agreement may be rectified by providing for the transfer by the said Sarah Jessie Guest of the said lands subject to the said mortgage. (2). Specific performance by the defendant of such rectified agreement, the plaintiff being ready and willing and hereby offering as such executor to carry out such agreement on his part.

Defence and counterclaim. The defendant says that (1) He admits paragraphs one and two, and says that the second mentioned lands were also subject to a mortgage for £2,500; (2) He does not admit any of the allegations in paragraph three; (3) Save that he does not admit that the said memorandum was prepared in pursuance of such agreement he admits paragraph four subject to the production of the said memorandum; (4) He does not admit any of the allegations in paragraph five, and says that the said memorandum was before execution perused and approved by the solicitor for the said Sarah Jessie Guest; (5) He admits paragraph six, and says that he and the said Sarah Jessie Guest so went into possession under and by virtue of the said memorandum; (6) He admits paragraph eight; (7) Save that he refuses to carry out the agreement set out in paragraph three of the statement of claim he does not admit any of the allegations in paragraph nine; (8) He will rely on Section 209 of the *Instruments Act 1890*, and will contend that the plaintiff is not at liberty to vary by *parol* evidence the said memorandum; (9) He will contend that the plaintiff cannot have rectification and specific performance of the said agreement when rectified; (10) He has always been ready and willing and hereby offers to carry out the provisions of the

said memorandum or to rescind the same, and to give up possession of the said first mentioned lands to the plaintiff on the plaintiff giving up to him possession of the said second mentioned lands.

Counterclaim. The defendant says that (1) He partially repeats paragraph four of the Statement of Claim, omitting the first six words thereof; (2) He was induced to enter into the said agreement to exchange the said lands by the fraudulent misrepresentation of the said Sarah Jessie Guest and her agent, James Elias Guest.

Particulars of misrepresentation:—They represented to the defendant that the said first mentioned lands and the buildings thereon brought in sufficient rents and profits to pay off the interest on the mortgage and to effect all necessary repairs and to leave a balance of £2 per week net profit, whereas in truth and in fact the rents and profits from the said lands and buildings thereon are not sufficient to pay the said interest and to effect the necessary repairs, and the defendant counterclaims £1500.

Reply. The plaintiff as to the defence says that, save in so far as they contain admissions of the allegations of the statement of claim, he joins issue upon paragraphs two, three, four, five, seven and ten thereof. The plaintiff as to the counter-claim says that he denies each and every allegation of paragraph two thereof.

The Memorandum of Agreement is as follows:—

"Agreement made the third day of April, One thousand eight hundred and ninety, between John Ralph Watson, of Notting Hill, in the Colony of Victoria, gentleman, of the one part, and Sarah Jessie Guest, of Murray Street, Caulfield in the said Colony, wife of James Elias Guest of the same place; contractor, of the other part. Witnesseth that for the consideration hereinafter mentioned, the said parties hereto hereby agree as follows: The said John Ralph Watson in consideration of the agreement by the said Sarah Jessie Guest, hereinafter contained hereby agrees to transfer to the said Sarah Jessie Guest, in the month of January, one thousand eight hundred and ninety-one, a piece of land containing thirty five acres, being part of section eighty, Parish of Mulgrave, free and clear from the mortgages now existing thereon, and the said John Ralph Watson agrees to pay the interest due or to become due on the said mortgage until such transfer is completed. The said Sarah Jessie Guest in consideration of the agreement by the said John Ralph Watson, hereinbefore contained, hereby agrees to transfer to the said John Ralph Watson in the said month of January, One thousand eight hundred and ninety-one, all that piece of land being lots 16 and 17 on the plan of the Railway Reserve Estate, Camberwell, having a frontage of 132 feet to the Prospect Hill Road, by a depth of 135 to the Railway Parade, together with the building erected thereon, and the said John Ralph Watson agrees to pay the interest which may become due on the mortgage for four thousand seven hundred pounds, now existing on the said land and premises, from the date of this agreement. It is agreed between the said parties hereto, that each shall be entitled to possession of the respective pieces of land and premises so to be transferred as aforesaid, and the rents and profits thereof, on the execution of this agreement, and from the date thereof. As witness the hands and seals of the said parties the day and year first before written.

Signed sealed and delivered by the said John Ralph Watson in the presence of G. H. R. Osborn, Solicitor, Melbourne.	} JOHN R. WATSON. (L.S.)
Signed sealed and delivered by the said Sarah Jessie Guest in the presence of T. Jones, Nurse, Murray Street, Caulfield.	
	} S. J. GUEST. (L.S.)

Mr. Hayes, for the plaintiff, read the pleadings and opened the case.

Mr. Cussen for the defendant. If your Honour would deal with the law point raised on the pleadings before going into the evidence I think it would materially shorten the case as I submit the point raised by the defence is fatal to the plaintiff's case. Your Honour will see that this is a written agreement under seal with respect to lands, and we have pleaded the *Statute of Frauds*. What the plaintiff really seeks here is specific performance with a *parol* variation and on the pleadings as they stand I submit the plaintiff must fail.

Mr. Hayes. My friend has not cited any authorities for the proposition that he had advanced but here I submit there has been a part performance which takes the case out the Statute, *Woolam v. Hearn White* and *Tudors L.C.* 6th Edition Vol. II p. 508. [*Mr. Cussen* part performance is not pleaded.] It is admitted on the pleadings that there has been a part performance, the parties have gone into possession and in that view of the case we are entitled to succeed *Legal v. Miller* 2 Vesey sen. 299. There have been cases where it has been sought to specifically enforce a written agreement and the defendant has set up a *parol* variation and specific performance has been decreed without insisting on the defendant filing a cross bill.

Mr. Cussen. If your Honour thinks that part performance is set up by these pleadings then I say that there is no part performance referable to this *parol* variation. The reason of this doctrine of part performance is that where a person is in possession of a piece of land the law will not assume that he is there as a trespasser. Then the part performance must be by the person seeking relief, *King v. Grimwood*, 12 A.L.T. 187, and the part performance set up here is not the going into possession by Mrs. Guest but the going into possession by Mr. Watson. That case of *Legal v. Miller* 2 Vesey sen. 299 is referred to in the case of *Pitcairn v. Ogden* 2 Vesey 375 in which case *parol* evidence was sought to be admitted to vary a written contract but there it was put on the ground of fraud. The same principle is also illustrated by *Rich v. Jackson* 6 Vesey, note on p. 333. On these two grounds, therefore, if part performance has been pleaded I submit the plaintiff must fail. First, that the part performance is not referable to the *parol* variation and secondly that the part performance must be by the person seeking the relief.

Mr. Hayes. May I refer your Honour to the case *Lanyon v. Martin* 13 L.R. Ir. Ch. D. 297. [WEBB, J. There the part performance was expressly referable to the *parol* variation.] Here there is only one agreement which is not severable. Mr. Watson pays interest on the mortgages on both properties and we have pleaded possession and I submit that that is sufficient for our purpose.

MR. JUSTICE WEBB.—This is an action for rectification of agreement and for the specific performance of that agreement when rectified; substantially that is an action for the specific performance of a written

agreement with a parol and variation. It is well settled that a plaintiff cannot bring an action for specific performance of a written agreement with a parol variation. A defendant may rely upon a parol variation and it may be decreed to be performed by a plaintiff with such variation but a plaintiff cannot bring an action for specific performance with a parol variation. But the plaintiff says in this case that there has been a part performance and that the rule as to specific performance is founded on the *Statute of Frauds* and that part performance takes the case out of the statute. Now in my opinion the part performance must be referable only to the parol variation and not to a performance which is equally referable to the agreement without any variation. In the notes to *Woolam v. Hearne* White and Tudor's L. C. 6th Edition, Vol. II. p. 518, a case of considerable authority it is said "Accordingly it will be found that parol evidence on the part of a plaintiff seeking specific performance of a written contract with a variation supported by such evidence, will, *where there are not acts of part performance*, be invariably rejected." And again it is said at p. 519 "Where, however, the parol variation has been *part performed* a specific performance of the written agreement with the variation will be decreed." In this case the parol variation has not been part performed. There was a written agreement for the exchange of land, the plaintiff's property being subject to a mortgage and the written agreement was that the defendant should pay interest on that mortgage but the parties inserted nothing as to who was to pay the principal. Possession of the land has been taken by the defendant and he has paid the interest on the mortgage both of which are referable to the written agreement, but there is nothing in the part performance which is referable to the parol variation, which is the payment of this mortgage. I am, therefore, of opinion that this part performance does not apply. Further it does not apply because it is also well settled that the part performance must be by the person seeking the specific performance. Here it is by the opposite party for the part performance of this written agreement so far as the plaintiff taking possession of the exchanged lands has nothing to do with this property. For these reasons I think that this point of law is good and that the judgment must be for the defendant with costs. Judgment for the defendant with costs on the claim. Judgment for the plaintiff with costs on the counter-claim without prejudice to any further proceedings by the defendant.

Solicitors for the plaintiff, *Goldsmith*.

Solicitors for the defendant, *G. H. R. and A. E. Osborn*.

(Before Hodges, J.)

VICKERY v. FOLEY.

Sept. 11.

Where there has been a breach of contract to deliver

shares, the plaintiff is entitled to elect, as the measure of damages, whether he will take the market value of the shares at the time of the breach or at the time of the trial.

The market value of a commodity is the price at which somebody is willing to sell and somebody is willing to buy, and not the price at which there are sellers but no buyers.

This was an action by the plaintiff for breach of contract by the defendant.

The Statement of Claim stated :—(1) The plaintiff is a member of the Stock Exchange of Melbourne, and the defendant is a mining speculator, and a member of the Victorian Stock Exchange. (2) On or about the 10th February 1891, plaintiff lent defendant 1000 shares in a certain gold mine known as "The Bear Hill Proprietary Gold Mining Company No Liability," returnable on demand, and the defendant gave to the plaintiff his cheque for £179 8s. 4d. as security for the said loan, such sum being the approximate value of the said shares at that time, (3) On or about the 26th February 1891, plaintiff demanded from the defendant the return of the said 1000 shares, but at the request of the defendant agreed not to insist upon their immediate return, provided the defendant gave security up to their then increased market value and the defendant thereupon gave to the plaintiff his cheque for £450 as security, such sum representing approximately the increase in the market value of the said shares at that time. (4) On or about the 20th March 1891, plaintiff bought from the defendant 200 shares in the said mine at 15s. per share, and on or about the 3rd of April 100 shares at 19s 10½d, but the defendant wholly neglected and refused to deliver the said shares, although repeatedly pressed to do so by the plaintiff, who was always ready and willing to accept the same. (5) On or about the 9th April plaintiff gave to the defendant notice in writing that unless he delivered the said 300 shares before 1 p.m. on the 10th April the plaintiff would either cancel the sale or re-purchase the said number of shares at the risk of the defendant, but on or about the 10th April 1891, the defendant verbally requested the plaintiff not to purchase such shares at such time, and the plaintiff consequently forebore from purchasing the said shares at such time. (6.) On or about the 28th April 1891 plaintiff gave to the defendant notice in writing to deliver before 3 p.m. on the 29th April scrip for 1,200 shares such scrip being the said 1,000 shares lent as aforesaid, and the said 300 shares sold by the defendant as aforesaid, less 100 shares sold by plaintiff to defendant, on or about the 25th February, at 8s. 7½d. and held by plaintiff with consent of defendant against the 1000 previously lent to defendant as aforesaid. (7.) On or about the 1st May, 1891, plaintiff gave to defendant notice in writing that he would purchase at the risk of the defendant the first lot of shares in the said mine that were offered at a reasonable price, the shares at the time of the said notice ranging in price between £4 and £5 per share. (9.) In accordance with the said notice the plaintiff did on or about

the 8th May, 1891, purchase 1200 shares in this said mine at £3 per share. (10). The plaintiff claims damage for the breach by the defendant, of the said agreement to return the said 1000 shares as aforesaid, and for the non-delivery of the said 300 shares bought by the plaintiff from the defendant as aforesaid.

PARTICULARS.

Dr.		Cr.	
Feb 25th. To 100		Feb. 10th Cheque	
Bear Hills 3/7½		for security ...	£179 3 4
(not yet de-		Feb. 28th Cheque	
livered) ...	£43 2 6	for further secu-	
May 8th. To 1,200		rity ...	450 0 0
Bear Hills at		March 20th 200 Bear	
£3 ...	3600 0 0	Hills at 15/ scrip	
		not delivered ...	150 0 0
		April 3rd 100 Bear	
		Hills at 19/10½	
		scrip not de-	
		livered ..	99 7 6
	<u>£3643 2 6</u>		<u>£878 10 10</u>

Difference £2,764 11 6, and the plaintiff claims £3,000.

The defence states: (1). He admits that the plaintiff did lend him 1000 shares in "The Bear Hill Proprietary Gold Mining Company, No-Liability," and that he did give the plaintiff his cheque for £179 3 4 as security, that on demand he would return to the plaintiff an equal number of shares in the said company. (2). Except that he paid the plaintiff a cheque for £450 as further security; he denies the allegation of fact in paragraph three of the statement of claim. (3). Except that he purchased the said shares at the price mentioned, he denies paragraph four of the statement of claim. (4). Except that the plaintiff gave the said notice to the defendant as in paragraph five alleged, he denies the allegations of fact in the said paragraph. (5). On the 2nd day of March, 1891, the plaintiff demanded delivery of the said 1000 shares from the defendant. (6). He denies that the 100 shares sold by plaintiff to him were held by plaintiff as against the 1000 shares hereinbefore referred to, and he says that the said 100 shares were to be held as against the 300 shares purchased from the plaintiff from him. (7). Except that the plaintiff gave the said notice to the defendant, he denies all the allegations of fact in paragraph seven of the statement of claim. (8). The defendant does not admit paragraph eight of the statement of claim.

The reply stated: (1) Except as to admissions therein contained he joins issue on the defence herein. (2). He will object that paragraph 5 of the defence, even if true affords no answer to the plaintiff's claim herein, or any part thereof.

Mr. Mitchell (*Mr. Purves*, Q.C., and *Mr. Bryant* with him) for the plaintiff.

Mr. Leon, and *Mr. Goldsmith* (*Mr. Topp* with them) for the defendant.

Mr. Goldsmith, in opening the case for the defence said, it is admitted that the defendant did not return these shares, and the only question is, on what ground the damages are to be assessed. (See *Maine on damages*, 4th Edition p. 174). No case was made by

the pleadings that the defendant knew when he got the loan that the plaintiff might be compelled to go into the market and purchase at any price. Under ordinary circumstances the test of the measure of damages is the value at the time at which the loan was asked for back again. On the 2nd or 3rd March the shares were asked for, and the test of the measure damages is the value either at that time or else the price at the time of the trial, *Owen v. Routh* 14 C.B. 327. The position was that the plaintiff having lent these shares made a lot of time bargains, and took his chance of getting the shares back again. The plaintiff at the time of making this loan of shares, contemplated that he might not get the shares back again. The rise in the price of the shares was the result of what was known as a "corner," a mere market operation without any reference to the value of the mine itself. There is no defence to this action, and the only question is the measure of damages. The rise in the price of the shares was the result of the plaintiff's own action, by overselling, and the defendant is not to be bound to supply at such advanced price so brought about. *Kountz v. Kirkpatrick*, 72 Pennsylvanian State Report 376.

Mr. Leon, in addressing the Court on behalf of the defendant, said—These shares were to be given back on demand, which was made on the 2nd and 3rd of March, and the demand was refused. Then it was the duty of the plaintiff to go into the market and buy for himself but the plaintiff seemed not to have made up his mind what he was going to do. The plaintiff being very much involved in these shares himself, got into a state of vacillation, and he now sought to throw the whole of the burden of vacillation upon the shoulders of the defendant. The true measure of damages was the value of the stock at the time when definite notice was given by the plaintiff to the defendant to return the loan which was on March 2nd and 3rd. And as to the 100 shares which were bought in March, demand was made for them on 9th April and the damages for non-delivery of those shares was the value of the shares on that date viz., the 9th of April.

Mr. Mitchell for the plaintiff was not called on.

MR. JUSTICE HODGES—This is an action in which the plaintiff seeks to recover damages for the non-return of 1,000 shares in the Bear Hill Proprietary mine lent by plaintiff to the defendant and for the delivery of 300 shares bought by the plaintiff from the defendant, less 100 shares sold by the plaintiff to the defendant, so that the plaintiff claims damages for non-delivery of 1,200 shares. It is admitted that there is no absolute defence to the action, but the question raised before me is as to the principle upon which damages are to be assessed, and as to the time at which they are to be calculated. It is contended on behalf of the defendant that they should be calculated as upon the market value of the shares on the 2nd of March or as upon the market value at the present time. It is contended that they should be taken as to their market value on the 2nd of March, because the plaintiff wrote to the defendant on that day, telling

him that he required the delivery of 1,000 Bear Hills lent to him before 11.30 a.m. on the 28th of March. If the evidence had stopped there I should have been disposed to think that the defendant's contention was right, and that the morning of the 3rd of March was the time on which to calculate the value of the shares for the purpose of assessing the damages. But before the time for the purchase had arrived the plaintiff and the defendant had an interview, and the defendant asked the plaintiff not to purchase against him. That meant not to buy shares, and so fulfil his contract at that time, but to allow the matter to stand over for a while and the plaintiff did so. Subsequently to this the plaintiff and the defendant met from time to time, the defendant always being desirous that the shares should not be purchased by the plaintiff, and the plaintiff was willing for a long time to allow the matter to stand over. At length the market got into a very excited state, and the plaintiff became anxious lest he might not be able to satisfy certain contracts that he himself had entered into to deliver scrip, and accordingly on the 2nd of April he wrote to the defendant requiring the defendant to deliver up to him (the plaintiff) scrip for 1,200 shares before 3 o'clock on the next afternoon. That not having been complied with, the plaintiff on the 1st of May writes to the defendant, and tells him that he will purchase at the risk of the defendant, the first lot of shares offered at a reasonable price. Up to that time there had been a continual putting off and putting off of the plaintiff, at the suggestion of the defendant, but at that time, the shares not having been delivered, and the plaintiff not caring to run the risk of allowing the shares to perhaps go to a higher figure, he on the 8th of May went into the market and bought the shares at a price of £3 per share, and the evidence satisfies me that between the time the notice was given and the time that these shares were purchased the plaintiff could not have got the shares at a less price. I therefore think that the price he has given was the market value of these shares on the day on which he bought them, and that the market value had been slightly higher between the 28th of April and the time at which he purchased the shares, and that he paid no more than the market value of the shares, and if he is entitled to charge that price the amount of his claim is not more than he is entitled to. But it is urged that the damages are not to be assessed on the then price of the shares, because there had been a corner in these shares, and that the price had been unnaturally forced up so as to become something quite fictitious, and in support of that view an American authority, *Kountz v. Kirkpatrick*, 72, Pennsylvania State Reports, 376, was cited. I do not intend to depart from anything said there, but what was said there was that the market value of an article is not necessarily the market price for the day, and an examination of the case shows that what they mean is that the market price of an article on a particular day is the price at which persons are offering to sell but that if there be no buyers at that price then that is not the market value. I quite agree with that. I

think that the market value of an article is the price at which somebody is willing to sell and somebody is willing to buy, and I think that on this day the market value of the article in the sense in which buyers would be willing to give a price was quite up to what the plaintiff paid for these shares, and that from the time he made his demand up to the time he bought the market value was not lower than the price which he paid, and that he did his best to get the shares at the lowest price. I therefore think that that was the market value of the shares on that day. It is also argued that the damages should be assessed according to the market value at this time, viz., the time of the trial, and an English authority, *Owen v. Routh*, 14 C.B. 327, has been cited to me in support of that contention, but that authority only establishes that a plaintiff may be entitled to claim the market value on the day of the trial, but it does not establish that this is the only time which he is entitled to fix, but that he may (and the cases show that it is so) be entitled to elect whether he will take the market value at the time the contract is broken or at the time of the trial, and in this case I understand that the plaintiff has elected at the time at which he went into the market and bought, and I do not think that there was any legal obligation on him to stand out of the market and not buy these shares and wait until the present time, and, that being so, I think that the plaintiff was entitled to purchase the shares, and is entitled to his claim to be indemnified. The evidence, in this case, where, perhaps, one would expect a good deal of conflict, was given by both sides, so very fairly and honestly that I should be unwilling that either party should think that I credit one side more than the other. I do not think that either the plaintiff or the defendant said anything that they did not thoroughly believe, but the plaintiff has established his case, and I shall order judgment to be entered for the plaintiff for £2,764 11s. 8d., with costs.

Solicitors for the plaintiff, *Blake and Riggall*;
solicitors for the defendant, *Watson*.

IN CHAMBERS.

(Before a'Beckett J.)

SHEPPARD v. PENGLASE & ANOR.

7th, 9th October.

Rules of Supreme Court 1884, Order XXXVI rr. 39, 42, Order XLI r. 2; Order r. 5—Where, in an action against two defendants, judgment is given for one defendant and against the other defendant, the successful defendant is entitled to take out judgment on his own behalf without incorporating therein the judgment given against the other defendant—There need not necessarily be only one judgment in an action.*

Application on behalf of the plaintiff for an order that the judgment signed by Walter Penglase, one of

the defendants, should be set aside on the ground that the associate's certificate issued in the action was not in accordance with the judgment.

It appeared the plaintiff, as assignee of Walter Penglase, sued him and his wife, Mary Penglase, and claimed a declaration that Mary Penglase was a trustee of certain lands for the defendant, Walter Penglase, and asked for an order directing Mary Penglase to transfer the said lands to the plaintiff as trustee of the insolvent estate of Walter Penglase. The action was tried before Webb J. without a jury, and when the case was called on Walter Penglase asked that judgment should be entered for him on the ground that he was unnecessarily joined, inasmuch as he was an insolvent and could have no interest in the land in question, and that any interest he might have had was vested in the plaintiff as trustee of the estate. Judgment was thereupon given for the defendant, Walter Penglase, with costs. The action against Mary Penglase then proceeded, and judgment was given for the plaintiff against her in the terms asked for in the statement of claim. The defendant, Walter Penglase, then took out judgment on his own behalf and did not incorporate therein or in any way refer to the order made in the same action against the defendant, Mary Penglase. The plaintiff now sought to set aside such judgment.

Mr. Anderson in support. There can be one judgment only in an action. The defendant, if he desired to take out judgment should have incorporated therein the whole of the order or decree made in the action. Under the old practice in a suit in equity as this is there would have been one decree which would have included both judgments.

Dr. Smith to oppose. Under Order XXXVI. r. 39 a judge may order judgment to be entered for any or either party; and by Rule 42 of the same order, if a judge shall direct that any judgment be entered for any party, the certificate of the associate is a sufficient authority for entering up judgment accordingly. Any number of judgments may be taken out in an action by the parties entitled thereto. Order XLI. r. 2 provides that every judgment shall be prepared by the party entitled thereto. The defendant, Walter Penglase, was the party entitled to this judgment, and therefore he was entitled to prepare and take it out.

Mr. Anderson in reply. Order LXII. r. 5* shows that in Equity cases a certain procedure is required before judgment can be taken out. Order XXXVI. r. 42 applies only to common law actions. The provisions of Order LXII. r. 5 have not been complied with and therefore the judgment is bad on that ground.

HIS HONOR said: I will consider the matter.

HIS HONOR on a subsequent day said: When I adjourned the consideration of my judgment in this matter I had little doubt but that the defendant, Walter Penglase, was perfectly in the right. I have since considered the practice, and I have also consulted the prothonotary on the subject, and the result is that in my opinion the defendant, Walter Penglase, had a perfect right to do that which he has done. There

need not necessarily be only one judgment in an action. I dismiss the summons with £3 3s. costs, and I certify for counsel.

Solicitors, for plaintiff. *C. M. Watson*; for defendant, *Gill*.

(Before A'Beckett, J.)

HOWLETT AND SON V. LESLIE.

County Court Act 1890 (No. 1078), sec. 50—Action on Contract—Remission to County Court—Appearance—Applications to remit actions to the County Court under sec. 50 of Act No. 1078 can be made before entry of appearance. The intention of the plaintiff to apply for final judgment under order XIV., r. 1, is not good cause within the meaning of the section.

Application on behalf of the plaintiff under sec. 50 of the *County Court Act 1890* to have the action remitted to the County Court.

It appeared that the action was brought to recover £27 7s. 9d. on a contract, that the application was made within eight days from the service of the writ, and that the defendant at the time of making the application had not appeared to the writ of summons.

It was contended in opposition to the application that the application could not be made before appearance, inasmuch as before that the defendant had no *locus standi*, and it was submitted that if the defendant were allowed to apply before appearance, the plaintiffs would be deprived of the right of applying for final judgment under order XIV., r. 1.

It was contended in support that it was not necessary to appear before applying for the order, and that the question of the plaintiffs being deprived of their right of applying under order XIV., r. 1, should not be entertained because the plaintiffs, if they had commenced the action in the County Court, would have had the same facilities for obtaining speedy judgment as they would have in the Supreme Court.

HIS HONOR said—The first objection raised to this application is that no appearance has been entered to the writ of summons, but under the terms of sec. 50 of the *County Court Act 1890* I think it is unnecessary to enter in appearance before applying to have the action remitted to the County Court. I therefore disallow that objection. Then the reason for that objection is explained to be that the defendant, by not appearing, has deprived the plaintiffs of their right of applying for final judgment under rule 1 of order XIV., which rule cannot be resorted to until after appearance. As to that I would observe that the *County Court Act 1890* contains similar provisions to the provisions of order XIV., r. 1, and enables plaintiffs, in actions commenced in the County Court, to obtain judgment in as speedy a way as they could if they had commenced their actions in the Supreme Court. A plaintiff is under no obligation to commence an action of this nature in the Supreme Court

and if he does so commence it he does it with the risk of having it removed into the County Court. Under sec. 50 of the *County Court Act* an action is to be remitted unless good cause is shown. I do not think the wish of the plaintiffs to obtain the benefit of the provisions for final judgment in the Supreme Court is a good cause for not remitting the action to the County Court. I shall allow the summons.

Solicitor for plaintiffs, *W. H. Lewis*, for defendant, *Crisp and Cameron*

SITTINGS IN BANCO.

(Before Higinbotham C.J., a'Beckett, Hodges, Hood, and Molesworth J.J.).

CARSLAKE V. PRESIDENT ETC. OF CAULFIELD.

June 15, 16, 17, Oct. 1.

Local Government Act 1874, ss. 376, 384—Draining of roads—Powers of municipality. Held, by the majority of the court (Higinbotham C.J., and Hood J. dissentientibus) that section 376 of the Local Government Act 1874 does not authorise a municipality, either expressly or by necessary implication, in making a road to make drains for the purpose of draining the road in such a way as to discharge water on adjoining lands.

Appeal from judgment of Webb J (see 12 A.L.T. p. 80). The appeal was originally heard before a Full Court composed of Higinbotham C.J., a'Beckett and Hodges J.J. It was, however, directed that the appeal, by reason of its importance, should be re-argued before all the members of the court with the exception of Webb J. The facts sufficiently appear in the several judgments.

Mr. Isaacs and *Mr. Mitchell* (with them *Mr. Fink*) appeared for the appellants.

Dr. Madden and *Mr. Irvine* appeared for the respondents.

The following cases were cited:—*Hepburn v. Hawthorn* 3 W.W. and a'B (L) 161; *Ballarat v. Beaton*, 3 V.R. (L) 163; *Cameron v. Mount Rouse*, 3 V.R. (L) 207; *McDonald v. Coburg*, 13 V.L.R. 268; *Harding v. Board of Land and Works*, 9 V.L.R. (L) 448; *Geddis v. Proprietors of Bann Reservoir*, 3 Ap. Ca. 430; *Caledonian Railway Co. v. Walker's Trustees*, 7 Ap. Ca. 275; *Cracknell v. Mayor of Stretford*, L.R. 4 C.P. 629; *London and N.W. Railway Co. v. Truman*, 11 Ap. Ca. 45; *Attorney General v. Gas and Coke Company* 7 Ch D 217; *Whitehouse v. Fellowes*, 10 C. B.N.S. at p. 779; *Boulton v. Crowther*, 2 B. and C. 703; *Cator v. Lewisham*, 34 L.J.Q. B 74; *Metropolitan Asylums District v. Hill*, 6 Ap. Ca. 193; *Brett v. Slater* 14 V.L.R. 514; *Corio v. Smith*, 2 V.R. (L) 163; *Plate Glass Company v. Meredith* 7 T. R. 794.

Cur ad vult.

A'BECKETT J.:—The facts of this case are so fully set out in the judgments of other members of the Court that I need not now state them. They show

that for the purpose of draining a road constructed by the shire, the shire has cast drainage upon the plaintiff's land to the plaintiff's injury, an injury not the accidental result of operations intended to carry off water by other means, or of any temporary expedient, but the designed result of a scheme which contemplated the permanent use of the plaintiff's land for the purpose of receiving and carrying away the drainage collected and concentrated by the shire at the point of discharge by a pipe opening into the plaintiff's land. Section 376, under which the council claims to have the right to do this, gives the council no express authority to make drains. The authority is only inferred from the power to make roads. It is contended for the defendant that this implied authority is an authority to make drains which may do damage without liability to compensate for consequential injury. With this contention I cannot agree. It seems to me to involve an unfounded assumption that municipal bodies cannot drain roads without doing injury to private property. If roads can be drained without damage to individuals, the council, on the principle of *Metropolitan Asylums District v. Hill*, 6 App. Cas. 153, would be bound to abstain from doing damage. A power being given to do what might be harmless or injurious, according to the manner in which it was done, the council choosing to do it in an injurious manner could not say that it had statutory authority to do damage, and it would therefore be liable for the consequences. If the contention of the council be correct and it has the right to injure property by making drains, its immunity in exercising its statutory authority would not be confined to damage done within its own boundaries; it would have as good a right to cast water upon land in a neighbouring shire as upon land held by its own ratepayers. I have so far considered the question without reference to section 384, which gives the council power to construct a drain through private land making compensation to the owner. This provision for compensation strengthens the conclusion that the implied power to drain roads does not authorise it to invade private rights at its discretion. The act complained of in this case differs from any which has been the subject of former decisions by this court, though two of these decisions have affirmed principle wide enough to cover it. In no other case which came under the consideration of our Court has the council deliberately made use of private land as a permanent outfall for its drainage. Here the council has virtually appropriated part of the plaintiff's land as a drain for its road. Having power to make a good and harmless drain through his land and paying compensation, it has preferred to direct the water on to his land to make a bad and harmful drain for itself, for which the plaintiff will receive no compensation. Consistently with the decisions of our Court, relied upon by the defendant, this conduct should be held an oppressive, and therefore illegal, use of its power. My decision, however, is not based upon the abuse of statutory power. I think that the defendant has not the statutory power claimed, and I

agree with Hodges, J., as to the effect of our legislation upon the subject. In my opinion the appeal should be dismissed with costs.

HODGES, J.:—The plaintiff is the owner of land within the shire of Caulfield which has a frontage to Bond-street. The defendants are the president, councillors, and ratepayers of that shire. Webb, J., who tried the cause, states the facts and his findings in the following words:—

"Before the execution by the defendants of the works hereafter referred to there was, as I find upon the evidence, and after a personal inspection of the locus in quo, a natural depression or small water-course running from Bond-street into the plaintiff's land. At the western part of this depression the plaintiff or his predecessor in title cut a drain to carry the water into Kambrook-road. In or about the year 1893 the defendants caused Bond-street to be formed and channelled; constructed opposite plaintiff's land an open channel across the roadway from east to west, and put an earthen pipe 12in. in diameter under the western footpath, terminating at the western side of the footpath, at the point where the natural watercourse ran into the plaintiff's land, but they did not enter or construct any works within the plaintiff's land. The effect of these works was to concentrate the water previously flowing over the plaintiff's land to the point of overflow of the pipe, and to increase the volume of water discharged into this natural watercourse, thereby in times of heavy rain or flood causing injury to the plaintiff's land. The defendants have made no provision for taking this water through or out of the plaintiff's land, and, unless this constitutes negligence in the design of the works, I find that the works have been executed without negligence, either in their design or construction."

On these facts and findings the learned judge has given judgment for the plaintiff for 1s. damages with costs, and has also granted an injunction. From this judgment the defendants appeal. And we have to say whether the facts and findings referred to above give the plaintiff a cause of action against the defendants. It is not disputed that the defendants' acts are at common law a trespass to the plaintiff's land; that at common law they have no defence. But it is argued on their behalf that section 376 of the local Government Act 1874 is an answer to this action; that under this section the council can make what roads it pleases, and make them how it pleases; that the council can accumulate the water where it pleases and as it pleases; that it can discharge the water where it pleases and how it pleases, into a man's house, his garden, or his yard; that the only limitations on its right are that there must not be negligence in the design or construction of the road, and that the point of discharge must not be selected capriciously or maliciously; that negligence in design has reference not to the rights of adjoining owners, but only to the making of a good, efficient, and sufficient road. Then they urged that in the present case it has made a good, efficient, and sufficient road, and consequently there is no negligence in design; that there is no evidence of negligence in carrying out the work, and that it has not maliciously or capriciously selected the place for the discharge of the water, and, therefore, all they have done is authorised by the statute above referred to, and it is the plaintiff's misfortune that he happens to possess the land where the water is discharged from the road. If the above be the true con-

struction of the statute, it is a very harsh statute, for under it a man may be compelled as a ratepayer to contribute to the making of a road, which is to do peculiar and permanent injury to, and which may even ruin, the very property in respect of which he is rated. Further than this, the construction of the act contended for by the defendants has far-reaching consequences. According to that interpretation, the council may discharge water in a body on the plaintiff's land, and then leave it. How is this water to be got away? Can the plaintiff collect all the water that is thus discharged on his land into one body, and discharge it at any point he, in his discretion, thinks fit on to the road on the lower side of his ground? Could not the council object that he had no authority at common law or by statute to discharge this water in a body on its road, thereby tearing up the metal and damaging the road which it had made? And if they could maintain such an objection, then the plaintiff might be constrained to allow the water to spread itself over the whole surface of his land, and so render the whole of it absolutely useless. On the other hand, if the plaintiff can discharge the water in a body on the road below, then the persons who are possessed of land on the higher side of the road in dispute may in like manner discharge on to the road in dispute all water that comes in a similar way on to their land, and this water so coming on to the road in dispute is necessarily discharged on to the plaintiff's land. And by carrying this process on, the plaintiff might be shown to be under an obligation to take on his land, and provide for carrying off his land, all the water that gets on all the roads in the municipality. And it is in my opinion, no answer to such difficulties and hardships to say that the ratepayers elect the councillors and so have the matter in their own hands as this would only be saying that the Legislature have authorised the majority of ratepayers to take the land of the minority of ratepayers for drainage purposes. Nor do I consider it any answer to say that a great number of persons are glad to take the drainage. With a more extensive knowledge of this country than that possessed by most people, I have no hesitation in saying that 99 out of every hundred persons would object to being compelled to take drainage, and all, without exception, would object in the places where land is valuable. Of course, the question of hardship does not determine the construction of the statute, but the consequences of the construction contended for makes me approach the question with considerable anxiety, and before I arrive at the conclusion that the Legislature meant so seriously to affect private rights I must find that intention shown" by express words or necessary implication (per Lord Blackburn, 6 App. Cas., 208). I proceed, therefore, to consider whether the Legislature has shown an intention by "express words or necessary implication" to authorise such trespasses as those complained of in this action. There are no express words authorising the trespass complained of. Section 384 authorises entry on adjoining lands for the purpose of making drains, &c., and requires compensation to be made. Section 385 authorises in certain cases entry

on adjoining grounds for the purpose of making a temporary road, but again requires compensation to be made. Section 386 authorises entry on lands to procure materials, but requires compensation to be made. And section 388 shows how careful the Legislature was in guarding individuals from injury by the exercise of the powers conferred. But no section in express words authorises the trespass complained of in this action. The remaining question is, has the Legislature authorised such trespass by "necessary implication?" The defendants say that section 376 gives such authority by necessary implication; that that section authorises the making of drains as part of the road, and that of necessity water is accumulated by these drains, and this water must in some cases at least be discharged over private lands, and, consequently, from their authority to make roads you must infer authority to discharge water over private lands. In my opinion this view is not sound. There is no doubt that a large number of roads may be made without discharging water over private lands. And I do not know that in any case there is an absolute necessity to discharge water over private lands; certainly no such case has been proved, though it is also without doubt that in a great number of cases the most economical way of draining a road is to drain on to private lands. But I cannot say that, because the Legislature has authorised councils to make roads, and because the most economical way of draining some roads is to discharge the water over someone's land, it must be inferred that the Legislature meant to authorise the water to be discharged over such land to the permanent injury of the owner and without any compensation to him, and therefore I am unable to agree in the conclusion that section 376 authorises this trespass by necessary implication. But, in my opinion, there is a further answer. In considering the power of the council to make roads we must look, not only at section 376, but also at 384. Suppose one section of an act of Parliament empowered a company to make a railway from Melbourne to Studley-park between two given lines and run trains thereon, and the next section authorised the company to take the land necessary for the making of the line by compulsory purchase. I venture to think that the company could not successfully contend that, as the one section authorised the making of the railway and the running of trains thereon, the company could make the railway and the running of trains thereon without exercising the power of compulsory purchase. The true construction of the act would be obtained by reading both sections. In the present case also I think that the true construction is obtained, not by looking at section 376 alone, but by reading it in conjunction with other sections specially as regards the subject in dispute, by reading it in conjunction with section 384, which is ancillary to section 376. Now section 2 makes the headings and sub-headings part of the act. Both these sections are under the sub-heading "Making, maintenance, and management of roads, &c." And section 384 is between two sections dealing with roads. Therefore

if we assume that the council has authority to make every road in its district, some roads must be drained through private lands; this can be done under section 384. And if this can be done under section 384, there is no necessity to imply the power in section 376, and the power is not to be implied in section 376 unless it is necessary to imply it. In my opinion, every work authorised by section 376 can be effectively carried out without implying in that section the right to trespass claimed by the defendants, and therefore such right should not be implied. And my view of the act, shortly stated, is that section 380 places all highways within the municipal district under the control of the council of the municipality. Section 376 authorises the council to expend the ratepayers' money in making, &c., such highways. Section 384 authorises the council to make drains on lands adjoining or lying near such highways, for the purpose of carrying away the water from such highways, but requires compensation to be paid for damage the owner and occupier sustain through the exercise of the power. I now propose briefly to refer to the different statutes that have been passed on this subject to show that the history of the legislation points to the same conclusion. By Act 16 Vic. No. 40, provision was made for the formation of road districts and road boards, and by sections 6 and 13 certain power is given to make and maintain roads and bridges, and by section 48, authority is given to the road boards "to cut through all or any lands, whether adjacent or otherwise . . . and to drain and turn water off the said roads or ways on or to any lands . . . without being deemed a trespasser or making any compensation for so doing." By this statute, therefore, express authority is given to drain water off the roads on to the adjoining lands, and the statute expressly says the boards are not to be deemed trespassers, and are not to be liable to pay compensation for so doing. This statute was passed early in 1853, and if the defendants had, under that statute, done what is complained of that act would have been a complete answer to any claim. This statute was passed soon after the discovery of gold in this colony, at a time when there was a very small settled population, when nearly everyone was on the move from goldfield to goldfield, and when provisions for the travelling public was of pre-eminent importance, and there was very little settled population to suffer injury. The next act to which I would call attention is the Act 18 Vic., No. 15. This statute authorises the formation of municipal districts, provided that the municipal district, to be formed, which is not to exceed nine square miles, contains a population of householders not less than 300. So that the Legislature are here dealing with portions of the colony that have become to some extent settled. Section 27 gives the councils of these municipalities the care and management of the roads, &c. Section 30 authorises the making of rates for the purpose of fencing, making, and repairing roads, &c. But in this act the power "to drain and turn water off the said roads or ways on to any land without making compensation for so doing" is conspicuously absent. And in lieu of this

section 48 of 16 Vict., No. 40, there are provisions in section 46 authorising the entry on private lands to make and conduct through such lands drains and watercourses, &c., "provided that such lands shall not be occupied as courts, yards, gardens, or dwelling-houses, or as approaches to any dwelling-house," but requiring compensation to be made for any injury inflicted. Now I cannot think that the Legislature intended by this later act to authorise in these more settled districts the pouring of water on to adjoining private lands (though occupied as a courtyard, garden, dwelling-houses, &c.) at any point the council in its discretion might think fit. I think that the Legislature have shown an intention directly to the contrary, that they have shown this different intention by omitting the express words used in the act passed only three years earlier, by making provision for entry for drainage purposes on paying compensation, and by limiting the right to enter the land not occupied as a yard, &c. And it is somewhat difficult to believe that the Legislature meant that though you could not, even on paying compensation, make a drain through a man's yard to carry the water from the road, yet you could pour that water into his yard or his house without making any compensation. Now, if my view of this statute be correct, here is the first act establishing municipalities, and in this first act establishing municipalities the power to collect water on the road and pour that water from the road on to the adjoining private lands at any point the council in its discretion thought fit did not exist. And this statute did—that which it is said is so difficult to imagine—create corporations for the express object of attending to the roads, and has given no other power of draining roads over private lands than by making drains over such lands and paying compensation. The next statute that appears to me to require notice is Act No. 176, passed in 1863, when there was a much larger settled population in the colony. This act repealed 16 Vic., No. 40, and provided for the establishment of road districts and of shires. By section 215 public highways within road districts are placed under the care and management of the boards. By section 225 authority is given to make new roads; but no provision at all similar to that of 16 Vict., No. 40, sec. 48, is to be found in this act and instead of that provision section 237 provides—"It shall be lawful for the board to cut make and maintain drains or watercourses upon or through any lands lying contiguous to any road making reasonable compensation to the owners and occupiers of such land for any damage they may sustain thereby. Now, in my opinion, the Legislature—when they repealed section 48 of 16 Vict., No. 40, and in the enactment replacing it, made no similar provision, but authorised the boards to make and maintain drains upon or through lands lying contiguous to roads, and required them to make compensation to owners and occupiers for so doing—did not mean to take away the right to cut drains on adjoining lands without paying compensation, but by implication to preserve the right to pour any amount

of water on those lands without paying compensation. In other words the Legislature did not, in my opinion, mean that if the board make a drain so as to diminish the damage to the adjoining owner the board pay compensation; if it make no drain, but leave the adjoining owner to get rid of the water in the best way he can, it pays no compensation. Express words authorising this trespass are not in the later statute, and I can find no words indicative of an intention to authorise such trespass. The next statute on the subject is Act No. 184, passed in the same year as the last mentioned statute. This act repeals 18 Vic., No. 15, and contains similar provisions as to drains with Act No. 176, though the words "upon or through" in section 237 of Act 176 became "in and through" in section 272 of Act No. 184. Act No. 358 repeals Act No. 176 so far as that act relates to shires, but has similar provisions as to roads, and section 309 makes exactly the same provision as to drains as section 237 of 176. Then Act 359, passed on the same day as Act 358 repealed Act 184, but makes similar provisions as to roads and section 299 of this act corresponds with section 247 of Act 184. These acts are followed by the Local Government Act 1874, under which the defendants in this case acted. Now if my view be correct, the earliest road boards had authority to do such acts as are complained of in this action, but no municipality under our laws ever has had such authority. The construction which appears to me to be the correct construction of the act is said to be an unworkable one. This I am utterly unable to conceive. If for the advantage of the ratepayers a road is to be drained through the land of a private individual, it seems fair that the ratepayers should pay the damage the individual sustains for their benefit. If the water is an advantage to the individual, not a damage, he will have sustained no damage. If it be a serious damage to him he will be compensated accordingly. According to numerous decisions in our courts, the municipality is under no obligation to make a road; it has a discretion as to whether it will or will not make any particular road. And if the benefit to the ratepayers by the making of any particular road is not greater than the damage to some individual, I presume the council would not make such road. If the benefit to the public is greater, I can see no reason why the public should not pay for the benefit. The individual himself through whose land the drain is made has to bear his share of the burden with the rest of the ratepayers but he bears his share, and no more. I cannot see what there is cumbersome or unjust in this any more than in the vast majority of Railway Construction Acts. And the construction of the statute which appears to me the correct construction does not work injustice to anyone, and creates no great difficulties, and I regret that I cannot bring my mind into accord with that of the learned Chief Justice and my brother Hood; but having formed an opinion in favor of the plaintiff after careful consideration, it is my duty to give effect to it. I am of opinion that the appeal

should be dismissed, with costs.

Molesworth, J.—In dealing with this appeal from a decision in favor of the plaintiff, in my opinion the plaintiff ought to succeed unless it can be shown that the decision was wrong, even though the members of this court cannot agree with all the reasons given by the learned primary judge for his judgment. In other words, if the facts found justified the decision, and there be evidence to justify the judge in so finding, then the successful plaintiff should hold his judgment. In this case I think the evidence supports the judge's findings. Taking even the uncontradicted evidence, there is evidence to show that the defendants in effect claim an easement over what was a natural depression overgrown with grass running from east to west over the plaintiff's land. Over this valley, through which water used sometimes to flow, the defendants in effect say, "By our system of draining the road and by our pipe under the footway we claim the right to concentrate the drainage and storm water; and also (as their own engineer says) all the drainage from a large area and all the house drainage as well, and to send it all through the plaintiff's land. There can be no doubt that the system adopted (whether the pipe through the footpath from the road brought the storm water and drainage "on to" the plaintiff's land according to one witness, or "to" the plaintiff's land according to another) would be injurious to the plaintiff, and, in my view, the defendants have no right to remove a nuisance from the road on to the plaintiff's land unless they can justify their act. To my mind there is evidence that the defendants, through their engineer, in effect admitted that to make their system of drainage complete there should be a drain or culvert through the plaintiff's land from Bond-street to Kambrook-road, which would have been made for about £30. In deciding for the plaintiff, Mr. Justice Webb held, as I understand his judgment, that the trespass complained of had not been justified, and also, on the facts of this case, that the defendants were guilty of negligence, inasmuch as they made no provision for taking the water, &c., through and out of the plaintiff's land. It appears to me that the defendants claim a statutory right to commit the trespass complained of, and in effect claim an easement over the plaintiff's land. The plaintiff alleges that the statute does not authorise the trespasses, and that the defendants are not entitled to the easement claimed unless they pay compensation, as by the statute provided. Section 376 of the *Local Government Act 1874*, No. 506, on which the defendants strongly relied, does not, in my opinion, authorise the trespasses complained of. I also think that the defendants were bound to exercise the powers given to them by section 384, if section 376 authorised the trespasses. If section 384 means that the powers conferred by that section should be exercised only in cases where it is reasonable to exercise them, the defendants failed to prove facts from which it could be inferred that the exercise of those powers would in this case be unreasonable. It must be remembered that the defendants justifying under

the statute are bound to prove their defence. The burden of proof is on them. It is for them to prove facts that would enable them to rely on the statute. Among other authorities relied on before Mr. Justice Webb was the case of *Geddis v. The Proprietors of the Bann Reservoir*, L.R. 3, App., Cas., p. 430. Mr. Justice Webb's decision may, I think, be supported on the principles laid down in that case. The case *Cator v. Board of Works for the Lewisham District*, 34 L.J., Q.B., p. 74, per Bramwell Baron, at p. 82, also supports the judgment under appeal. The defendants further contended that there should be a new trial, so that they might prove that the exercise of the powers given by section 384 would in this case be unreasonable. The defendants should not, I think, get a new trial to enable them to prove what they omitted to prove at the past trial. On the whole, in my opinion, the decision of Mr. Justice Webb should be affirmed, and this appeal should be dismissed with costs. I agree with the conclusions arrived at by Mr. Justice A'Beckett and Mr. Justice Hodges, affirming Mr. Justice Webb's decision.

HIGINBOTHAM C.J. (*dissentiens*).—This is an appeal from a judgment of Webb, J. The statement of claim contained three alternative causes of action. The first count charged a wrongful act or trespass. The second count charged negligence in designing, levelling, and forming Bond-street and other streets adjoining thereto, being streets within the shire, and in designing and constructing the drains in the said streets. The third count charged a wrongful omission to carry a drain through and out of the plaintiff's land. The learned judge appears in his judgment to have dealt chiefly with the second cause of action, and with the third in connection with the second. He found as facts that the effect of the defendant's works in the formation and channelling of Bond-street, and in constructing an open channel across the road, where a small natural watercourse had previously run into plaintiff's land and putting an earthen pipe under the western footpath, was to concentrate the water previously flowing over the plaintiff's land to the point of outflow of the pipe, and to increase the volume of the water discharged into the natural watercourse, thereby, in times of heavy rain or flood, causing injury to the plaintiff's land; that the defendants had made no provision for taking this water through or out of the plaintiff's land on the western side, which was the omission charged in the third count; and that the works had been executed without negligence either in their design or execution, unless the omission to make such provision constituted negligence in the design of the works. The judge further held, as a matter of law, that the omission to make such provision constituted, according to the decision of the Full Court in *Brett v. Slater* (14 V.L.R., 77), actionable negligence entitling the plaintiff to judgment, and judgment was accordingly entered for the plaintiff, with damages 1s., and an injunction against the defendants. It is to be inferred that the learned judge would have given judgment for the defendants, and not for the plaintiff, if he had not felt himself bound by the supposed

authority of this case. The learned primary judge, in my opinion, formed a mistaken view of the decision in *Brett v. Slater* (14 V.L.R., 77), and erroneously concluded that that case was intended to overrule and that it had the effect of overruling the previous decisions referred to in the judgment now appealed from. As a member of the Full Court which heard and decided that case, I am satisfied that no such intention or effect was present to the mind of the Court. The three earlier cases of *Hepburn v. Mayor &c., of Hawthorn* (3 W.W. and A.B., (L.), 61), *President, &c., Shire of Ballarat v. Beaton* (3 V.R., (L.) 163), and *Cameron v. Shire of Mount Rouse* (3 V.R., (L.) 207), were all of them brought prominently in argument before the Court in *Brett v. Slater*, and it is hardly credible that the Court would have set aside any or all of these old and familiar decisions without any mention or comment whatever if it intended to overrule them by its judgment. In *Hepburn v. Mayor, &c., Hawthorn* the decision rested on two distinct grounds. The Central Road Board, purporting to act in the formation and metalling of certain roads under the authority of the "Road Act," 16 Vic., No. 40, made a culvert and stone crossing, and thereby concentrated the drainage and discharged it upon the plaintiff's land. It was held that under section 48 of the Road Act, the board was expressly authorised to act as they had done. So much of the decision in that case has long ceased to be law, not, however, as the effect of the judgment in *Brett v. Slater*, but by the repeal of the act on which this part of the decision rested. But the Court in that case, adopting the principle laid down in *The Plate-glass Company v. Meredith* (4 T.R., 794), founded its judgment on another and an entirely distinct ground, viz., that where an act of Parliament gives power to make roads it gives, by necessary implication, the power to construct the works necessary for the drainage of the roads, and that an action will not lie for consequences hurtful to individuals resulting from such works. The sixth section of the Road Act gave the Central Road Board power to form, construct, improve, manage, and maintain any existing or new made road or any bridge on the line thereof. The Court said:—

"It appears to us that even under the general powers of the sixth section there was authority for doing what has been done. The principle is a well-known one under which, when a law authorises the doing of an act, the same law is held to indemnify the doer of that act from all liability for the necessary results of doing it. If indeed that principle were not inoperative a person might be held a trespasser for doing the very act which the law expressly authorised him to do."

This ground of the decision in *Hepburn v. Mayor &c., of Hawthorn* (3 W.W. and A.B., (L.) 61) has been repeatedly affirmed, not overruled, by the subsequent cases. In *The President, &c., of Shire of Ballarat v. Beaton* (3 V.R. (L.) 163), the shire council, purporting to act under section 279 of the Shire Statute, the then existing act, which placed the roads within the shire under the control, care, and management of the council of the shire, and gave the council power to form, construct, improve, repair, and maintain all such roads, made a drain along a road which con-

centrated the water, and discharged it upon the plaintiff's land to his damage, just as in the present case. The Court held that the council, in so making the road as to throw the drainage water upon the plaintiff's land, were not bound to exercise the powers given by sections 306 and 309 of the Shires Statute, and construct drains through his land to take away the water brought upon it, and that the case was governed by *Hepburn v. the Mayor &c., of Hawthorn*. The Court said:—

"We there (i.e., in the case of "*Hepburn v. the Mayor, &c., of Hawthorn*") held that there was no redress whatever; that the old principle enunciated in the Plate Glass Company's case was strictly applicable; and that the corporation had merely done those acts which the law authorised them to do, and were not answerable, they having done those acts properly. The same principle was fully recognised in this case, but it was contended that section 309 was applicable, and that because the shire had power to make drains on the lands contiguous to the roads, therefore it was obligatory upon them so to do, and that there ought to have been a drain at the outlet after the water crossed the road, to catch it and carry it in such a way as to do less harm than it did. But the two sections are perfectly independent one of the other. The 309th section applies to cases in which it was necessary not merely to form the road, but also to cut drains on contiguous land to make the road drier and more efficient. If the council in the exercise of a sound discretion consider it unnecessary to make those drains, we cannot compel them to make them suit the purposes of the plaintiff, and afford him compensation for so doing."

In *Cameron v. The President &c., of Shire of Mount Rouse* (3 V.R., 4, 207) determined on demurrer, no question arose about the liability of the council for the injurious consequences resulting from the exercise of the power to make roads and drains on the roads. The plaintiff claimed damage for the alleged improper omission by the defendants to extend a drain which they had made from a road upon and through a part of the plaintiff's land beyond that part, and to construct it so as to convey the water to a proper outlet. The defendants justified under the 237th section of the act No. 176, which provided that it should be lawful "to cut, make, and maintain drains or watercourses upon or through any lands lying contiguous to any road, making reasonable compensation to the owners or occupiers of any such land for any damage they may sustain thereby." The Court held that the words "upon or through" decided the question, and that under those words a drain could be cut into land contiguous to a road without being carried through it. The facts in *Cameron's* case differed from those in *Hepburn v. Mayor, &c., of Hawthorn*, and *President, &c., of Shire of Ballarat v. Beaton*, in the material particular that whereas the drains from which the damage proceeded in the last-mentioned cases were made under the power given to make and maintain the roads, and the municipal body consequently incurred no liability, the drain in the case of *Cameron v. President, &c., of Shire of Mount Rouse* was made under a "perfectly independent" section of the then existing act, and could only be justified under that section. The facts in *Cameron v. President, &c., of Shire of Mount Rouse* were similar to those in *Brett v. Slater*. The difference in the

judgments in the two cases is explained by the difference in the language of the acts by which and in section 384 of the later act (the Local Government Act 1874) was substituted for or in section 237 of the earlier act No. 176. If the cases of *Hepburn v. Mayor, &c., of Hawthorn*, and the *President &c., of Shire of Ballarat v. Beaton*, have been overruled, as the learned primary judge has held, by *Brett v. Slater*, the application of the principle on which those two cases were decided to the construction of roads and streets by municipal councils has been also overruled. It is startling to hear it contended that this court has, without a word of comment and apparently without being aware of what it was doing, overruled or limited the application of an important principle of law laid down in an English authority of long standing, which has been followed, applied, and explained in many Victorian and English decisions of more recent date. But no mistake of that kind was in fact made in the case of *Brett v. Slater*. The marginal note in that case is misleading, and without an examination of the facts might point to the conclusion that the drains made by the shire council had been made in pursuance, or in intended pursuance, of the power to make roads and the drains on roads. *Brett v. Slater* was an appeal from a county court, and the facts stated in the case, and referred to in the judgment of the Court clearly show that the works which were the subject of complaint could only have been lawfully executed under the power in section 384 of the *Local Government Act 1874*, to make and open drains and watercourses in and through lands adjoining the streets and roads. The works consisted, in fact, of a diversion of a natural watercourse called "Yankee Gully," which branched off at a point south of the plaintiff's land into two channels running in a north-easterly and north-westerly direction. The drain made by the shire council drew the water from the two channels and brought it down to, or close to, the point where it entered the plaintiff's land. It appeared that the shire council denied its liability expressly on the ground that the drain was a natural watercourse. That the act done by the council was regarded by the Court as not having been done nor intended to be done in exercise of the power, given by section 376 of the *Local Government Act 1874*, to make and maintain roads, but under the independent section 384, which confers different powers subject to different conditions, appears clearly from the judgments of two members of the court. I said, in giving judgment:—

"If this were a case in which the council had constructed a drain for the drainage of the road, it would have been a question whether or not that drain had been negligently designed or negligently constructed, and in that case the plaintiff's right to recover damages against the council for their acts would have depended upon whether or not the works were negligently designed or negligently constructed. It is, however, quite plain that this work was of an entirely different nature, and that it was done, not in pursuance of, or in intended pursuance of, the powers for making or of draining the roads, but in the belief, we may suppose, that a power had been given to the council to discharge a body of water into the land of private owners without the obligation of taking

that water through the land of the private owner to some other road under the council's jurisdiction, and without any obligation to pay compensation for that act. Such a power did not exist in the councils. The power was claimed under sec. 384 of the *Local Government Act*, page 81."

Kerferd, J., also said:—

"Where the local governing bodies change the contour of the country and divert the streams of water running through it they must undertake such work, so as to provide that the water that accumulates shall be carried 'through' the land, and taken to a place where it will not do an injury." (Page 83.)

The learned primary judge has, in my opinion, overlooked the real ground of the decision in *Brett v. Slater*, and the judgment now appealed from which proceeded from that error cannot be upheld. But the plaintiff in showing cause against this motion has raised a further question of the highest importance. He invites us to review the two cases of *Hepburn v. Mayor, &c., of Hawthorn*, and *President, &c., of the Shire of Ballarat v. Beaton*, and to reverse the decisions in those cases, assuming them not to have been already overruled, so far as they apply to and would be held to govern the present case. It is to be observed in the first place that while we are at perfect liberty to review a previous decision of this Court, and while we ought not, in my opinion, to refuse in the present case to review, and, if necessary, to overrule the decisions referred to, the plaintiff should be regarded as having undertaken by this contention a task of no ordinary difficulty, and one in which the full burden is cast upon him to prove beyond all doubt that the decisions he objects to are undoubtedly erroneous. *Hepburn's* and *Beaton's* cases respectively were decided 25 and 19 years ago. During the time that has since elapsed they have determined the rights and regulated the action of all municipal corporations in Victoria in the making of roads and streets. They have been under the cognisance of the Legislature, we must assume, during the same period, and although the hardship they seemed to involve may have sometimes caused murmurs, and even doubts, they have not been overruled or modified either by the Court or by any of the numerous acts relating to local government which have since been passed. We are called upon to, therefore, I think, to uphold them to the fullest extent, and not to suffer their authority to be weakened unless we are compelled to do so. They are both founded on the principle long established, and now quite indisputable, that where Parliament has expressly or by necessary implication required or authorised an act to be done the doing of that act without negligence in the design or execution of the works necessary for accomplishing the act is lawful, and furnishes no cause of action to anyone who has suffered damage from the act. Both of these decisions have applied that principle to the making of roads, and of drains on roads, as a necessary part of a roadway by councils of municipal bodies under the authority of Local Government Acts, and both of them have established the doctrine that the owner or occupier of land adjoining a road so made has no cause of action against a municipal corporation for damage

caused to the land through water, or an increased volume of water, by drains made as a part of a road under the authority to make the road. This application of the above-mentioned principle is now disputed upon two grounds raised respectively under the first and the third of the three causes of action in the statement of claim. First, it has been contended, upon the first count, that the principle ought not to be and cannot be applied to cases where the discharge of water upon land adjoining a road would be at common law either a wilful trespass or a continuing trespass amounting to the creation of an easement over the land. No authority has been cited in support of either of those alleged limitations of the principle. Each of them would be, in my opinion, inconsistent with and would subvert the principle. Every act by which water is directed or permitted to flow from a drain on to the adjoining land is a wilful act on the part of those who make the drain, inasmuch as the entry of the water on the land is a necessary, and must be taken to be the foreseen consequence of making the drain on the road. We must not confound a wilful act of this kind, causing foreseen damage, with a malicious act done for the purpose of doing injury. Malice is not charged in the present case, and we shall certainly not assume that the defendants were influenced by malice towards the plaintiff when the council made this drain. The defendants cannot, in my opinion, be deprived of the protection which the Legislature intended to give them by the fact that they foresaw that the plaintiff's land would or might be damaged by the drain, and devised their scheme of drainage of this road with a full knowledge of that result, and with the intention, not malicious, that the road should be drained by means that would or might produce that result. The contention that the principle must not be applied wherever the drainage is great, or frequently recurring, or continuous, is equally unwarranted, I think, either by authority or reason. In *Palmer v Service* (see *McDonald v Shire of Coburg*, 13 V.L.R. 280, foot note), which is the earliest Victorian authority on this subject, it was observed by the Court that—

“Owners may fairly be taken to have purchased with full knowledge of the advantages and disadvantages attendant upon their property abutting on a public road. The improvement on those roads must usually have been a benefit to them and the Legislature, in providing that such improvements might be effected on existing roads without any compensation for damages, which may happen in isolated cases, does not, if we may be permitted to say so, appear to have pursued an unwise or an unjust course.”

This observation has until now been generally approved, it has never been judicially dissented from. It is entirely consistent with the common knowledge we share of the peculiar circumstances under which roads and streets have to be made in a large and thinly-peopled country, and the necessity the Legislature felt itself to be under to give ample powers and full protection to those who are charged with the responsible duty of carrying out a purpose of obvious utility to the whole community. All owners and occupiers of land are benefited by the making of roads in their vicinity. Many owners and occupiers

gain large and permanent advantages from the discharge of water on their land from road drains. It would seem to be impossible to divide the isolated cases where damage and not benefit, is caused into classes distinguished by the amount or the continuing or recurring causes of damage, and to say that an owner or occupier who suffered a little or seldom should not have, but that an owner or occupier who suffered much or often or continually should have a cause of action of trespass against the body that made the road. The Legislature has not deemed it possible, or at all events expedient, to make such a distinction, and it is therefore not competent for this Court, in my opinion, to make it. Secondly,—It has been argued in connection with the cause of action in the third count for wrongful omission that the council have a statutory power under section 384 of the *Local Government Act* 1874 by making drains in and through lands adjoining roads to prevent damage arising from the water discharged on such land from road drains, and that if in any case, by reasonable exercise of that power the damage can be prevented, it is the duty of the council to exercise the power, and so prevent the damage. This argument rests on the following dictum of Blackburn, L.J., in the case of *Geddis v Proprietors of Bann Reservoir*, 3 App. Cas. 456 (1878).

“I take it, without citing case, that it is now thoroughly well established, that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, though it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised (if it be done negligently.) And I think that if by any reasonable exercise of the powers either given by Statute to the promoters or which they have at common law, the damage can be prevented it is within this rule “negligence” not to make such reasonable exercise of their powers; I do not think it will be found that any of the cases (I do not cite them) are in conflict with this view of the land.”

See also per Selborne, L.J., to the same effect (page 542 and 454). The rule as stated in these *dicta* is, I venture to think, deficient in clearness and precision. It can hardly have been intended to lay down the general proposition that all statutory and common law powers of every description vested in a body of this kind must be exercised without regard to the special purpose for which they were given or the conditions annexed to them, and that in default of such exercise the protection of the law shall be forfeited and an action of negligence will lie at the suit of any person who suffers damage. Such a rule would obliterate the principle to which it is sought to be attached as a limitation. This defect was supplied, and a clear general rule, capable of being reasonably applied in all cases of this kind, was laid down two years later, in the case of *Julius v. Bishop of Oxford*, 5 App. Cas., 214 (1880). It was there held, upon a review of all the authorities, that permissive words, such as “it shall be lawful,” “may,” and the like, where they occur in a statute, are not equivocal words and that of themselves they merely make that legal and possible which there would otherwise be no right or authority to do; that their natural meaning is permissive or enabling only, but that there may be circumstances which may couple the power with a duty to exercise it, and that it lies upon those who

call for the exercise of the power to show that there is an obligation to exercise it. Blackburn, L.J., said, at page 241 :—

"I do not think the words 'it shall be lawful' are in themselves ambiguous at all. They are apt words to express that a power is given; and as, *prima facie*, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *prima facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it." Selborne, L.J., said at page 235 :—

"The language (certainly found in authorities entitled to very high respect) which speaks of the words 'it shall be lawful,' and the like when used in public statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a judge, or public officer, to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power."

The Lord Chancellor (Earl Cairns), in the same case, observed at page 222-3 :—

"The words 'it shall be lawful' are not [equivocal]. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon, to do so."

The test supplied by this later decision of the House of Lords for determining whether a public body discharging a public trust is, or is not, under an obligation to exercise a statutory power appears to differ from and to be more precise than the test contained in the *dicta* of the same learned judges in the earlier case. In view of the later decision it would be inaccurate, in my opinion, to say that such a body is bound as a donee of a particular statutory power to exercise reasonably or at all, all the other powers it possesses, under the statute or at common law, to prevent damage, or that it is negligence, within the general rule, not to exercise all such powers reasonably or at all. It would be accurate, according to the more recent authority, to say that where, and only where, a statutory power is shown by the context, or the particular provisions, or the general scope and objects of the enactment, to involve a duty or obligation to exercise the power in order to prevent damage, that power must be exercised, and the omission to exercise it in the manner prescribed for its exercise will be negligence. The decision

in *Geddis v. Proprietors of Bann Reservoir* (3 App. Cas. 430), it should be observed, does not need to be supported on the grounds stated in the *dicta* referred to. It appears to have been justified on the grounds stated by the same judges in the later case. In *Geddis v. Proprietors of Bann Reservoir* (3 App. Cas., 456), the statutory power to "alter, maintain, repair, widen, and deepen" channels or watercourses was a power expressly given by the statute for the purposes of the works of the undertaking, and this power had been exercised in the construction of the works by the widening and deepening of the River Muddock. The exercise of the power was held to be necessary, not only to prevent damage, but also to secure the safety and success of the undertaking itself—see page 454—and from those facts it might properly be inferred that there was something in the nature of the particular thing empowered to be done, and in the conditions under which the thing had to be done and was done, which coupled the power with a continuing duty to exercise that power. In this sense, viz., that where works are done under special statutory powers for the purpose of keeping the works in repair and preventing future damage through the works falling into the condition of disrepair, the case of *Geddis v. Proprietors of Bann Reservoir* has been repeatedly recognised by this Court. See *Scott v. Mayor, &c., of Collingwood* (7. V.L.R., L. 280). Now, can such a duty be inferred in the present case from the terms of section 384 of the *Local Government Act 1874*, or from the context, or from the other particular provisions, or from the general scope and objects of that enactment? Section 384 is in the following terms :—

"The council of every municipality may in and through any lands adjoining or lying near to any street or road within the municipal district make and open such ditches, gutters, tunnels, drains, and watercourses as to such council may seem fit, and all ditches, creeks, gutters, tunnels, drains, or watercourses within or adjoining to the municipal district may make, scour, cleanse, and keep open, and for any of the purposes aforesaid may enter upon any lands, and such council shall make compensation for the owners and occupiers of any lands for any damage which they may sustain through the exercise of any of the powers conferred by this action."

This section is found in the same part and the same subdivision of the act as section 376, which authorises, by the use of the same term "may," the making, improving, and maintaining by the council of streets, roads, bridges, and ferries. The powers contained in this section are given for analogous objects of public utility, and are to be exercised by the body which is entrusted with the application of the municipal rates for the benefit of the whole of the ratepayers. In all other respects the two sections are independent of and distinct from one another. Section 384 does not purport to confer a right of any kind upon any individual ratepayer or class of ratepayers. The words "in and through" at the beginning of the section cannot be construed to mean more than this, that it shall be a condition of the exercise of the power given to the council that where a drain or watercourse is made on land adjoining or lying near to any street or road, where the risk of damage

to property would probably be greater than in places distant from streets or roads, the drain or watercourse must be taken through such land so as to become connected with other means of carrying off the water likely to be concentrated in such localities. The words give no right to the owner or occupier of land adjoining a street or road to demand the exercise of the power; they only guarantee him a certain amount of protection from damage in case the power is exercised. The provision for compensation also forbids, in my opinion, the interpretation that would make the exercise of the powers of this section compulsory. It would be unreasonable that a person, who is to get compensation for any damage that he may sustain through the exercise of a power, should have a right to insist that damage should be done to him in order that he may receive compensation for such damage. The words "such . . . drain and watercourse as to such council may seem fit" appear to me to put the true construction of this section beyond doubt. The Legislature, in the first instance, by using the word "may" conferred a purely discretionary power, and then by these additional words it forbade the inference of any obligation whatever in the exercise of that power. The council cannot at once be wholly free to decide that the power shall not be exercised and at the same time under an obligation to exercise it, and liable as for negligence for not exercising it. Applying the proper tests of construction to the text and the context of this section I am unable to find any indication of an intention on the part of the Legislature that the powers of this section should be used by the council for the benefit of persons who may be damaged by the exercise of the powers given by section 376. The Court would, in my opinion, usurp the function of the council, and would defeat the intentions of the Legislature, if it should hold that the omission to make, under the powers given by this section, a drain through the plaintiff's land constituted negligence for which the municipal body is liable. I am of opinion that the plaintiff has failed to support the judgment on any ground, and I think that the appeal should be allowed with costs, and that the judgment for the plaintiff should be set aside, and that judgment should be entered for the defendants with costs. But the majority of the members of the Court are of opinion that the appeal should be dismissed, and, accordingly, it is dismissed with costs.

Hood, J., (*dissentiens*).—The defendants in this case in making and forming a certain road within their municipal district, made side channels, and thereby concentrated the drainage and storm-water at a point in the road opposite the plaintiff's land where there is a natural watercourse running into his land and thus discharged it on to his land in a much larger volume than formerly, without making provision for taking it through and away from the land. The plaintiff brought an action, which was tried before a judge without a jury, when judgment was entered for him for 1s. and an injunction granted against the defendants. The defendants having made no provi-

sion for taking the water through or out of the plaintiff's land, the learned judge found as a fact that unless this constituted negligence in the design of the works, the works had been executed without negligence either in their design or construction. It is also, I think, to be assumed from the judgment that the injury to the plaintiff was the necessary and natural result of the defendants' works. The learned judge was of opinion that the case fell within the decision of this Court in *Brett v. Slater* (14 V.L.R., p. 77), and followed it without expressing any opinion of his own on the point in dispute. On this appeal the defendants have contended that having done nothing more than what they were empowered by statute to do, and being guiltless of negligence in what they did do, they are not liable. The question for determination on this appeal is, whether that view is correct or whether, as the plaintiff contends, the defendants have no right to execute works on their roads if the necessary result is to drain water on to his land. In every case of this kind the powers and the liabilities of a body created by statute must be determined upon a true interpretation of the statute under which it is created. If the act done is expressly or by necessary implication authorised by act of Parliament it is lawful, and it can only become unlawful, in consequence of the mode in which it is carried into execution (*Boulton v. Crowther*, 2 B and C., 703, *Mersey Dock Trustees v. Gibbs*, L.R. 1 E. and J., App. 93). Nor in my opinion does the nature of the result of what they do make any difference as to the liability of the defendants if it is the natural and necessary consequence of what Parliament has authorised. It may be that the injury resulting to the plaintiff arises in the shape of a nuisance (*R. v. Pease*, 4 B. and Ad. 30), even amounting to a perpetual right to shake a house by traffic on a railway, and thereby depreciate a man's property by imposing on it a servitude of vibration (*Hammermith Railway Co. v. Brand*, L.R. 4 E. and J., App. 171), or amounting to the right to depreciate property by creating a nuisance in perpetuity (*London and Brighton Railway Co. v. Truman*, 11 App., C. 45). Or it may be that the result of what has been authorised by statute amounts to a direct trespass, as by the overflow of a canal on to a man's property (*Whitehouse v. Birmingham Canal Co.* 27 L.J., Ex. 25), or into his mines (*Dunn v. Birmingham Canal Co.*, L.R. 7 Q.B., at p. 261), or by the bursting of a sewer letting foul water on to the plaintiff's premises (*Hammond v. Vestry of St. Pancras*, L.R. 9 C.P., 316). But whatever the result may be, if that result is the necessary and natural consequence of doing what Parliament has authorised, done without negligence, no action will lie. It is therefore necessary to consider what the defendants here have done and what the Legislature has empowered them to do, but in construing the act of Parliament we must look not for any words expressly authorising the defendants to commit a nuisance or to do damage to anyone (*Brand's case*, L.R. 4, E. and J. App. at p. 202). All we can ever find will be authority to do certain things, and the question then for consideration is

what was the meaning of Parliament in giving that authority. What the defendants did is easily stated. They made and channelled a road in a proper way according to a proper design. They found running across the road and into the plaintiff's land a water course or natural depression, and they allowed the water to run down their street channels into that depression. They thus increased the flow of water through this depression on to the plaintiff's land and did him some injury. They placed, as they had a perfect right to place, a discharge pipe under the footpath, but this had no effect whatever upon the flow of the water, and can in no way contribute to the plaintiff's cause of action. This is, I think, a short and accurate statement of the facts. The statute under which the defendants derived their existence and their powers is the *Local Government Act* 1874. By that Act the care and management of all streets and roads within their district devolved upon them, and they have power to make, improve, and maintain all such streets and roads, (secs. 376, 380.) Such a power of making, improving, and maintaining would necessarily include the sufficient drainage without which no proper street or road could exist. Now, the necessary result of what Parliament has directed or authorised to be done must presumably have been in the view of the Legislature at the time when the act was passed (*Metropolitan Asylums District v. Hill*, 6 App. Ca., at p. 212 per Lord Watson.) If, therefore, the necessary result of making a road is to cast water on the adjoining lands, why should the defendants be liable for the natural result of what an act of Parliament has authorised them to do, they not being guilty of any negligence in what they have done? When Parliament gave to the local bodies the power to make, improve, and maintain the roads, must it not be assumed that it had in view the necessity for drainage? And if roads are to be drained, how is this to be done? Unless section 384 of the *Local Government Act* was so meant, no provision is expressly made in the act for this purpose, and the Legislature must therefore have taken for granted that some means existed. But the only outlet for drainage would be the sea, or some stream or watercourse leading thereto. Few portions of this country adjoin the sea, and rivers, or natural watercourses into which roads could be drained without injury to private rights are unfortunately few and far between. There are innumerable places where, if the roads were formed and made, there would be no means of getting rid of the drainage except on to the adjacent lands. And in considering the intention of the Legislature, it should be remembered that the nature of a great part of this country is such that the inflow of drainage on to a man's land would be considered a blessing rather than a curse, and also that even where some slight injury might be inflicted it would be more than compensated for by the increased value of his property caused by the improvement in the adjacent road. In this newly-settled country the primary object of all our Local Government Acts have been road-making, and the Legislature may well have intended that this

should be carried out even at the expense of the individual, especially as in most instances the damages would be trifling, and in all cases the administration of the act is placed in the hands of the ratepayers themselves. It was urged against this view that the defendants need not make the roads, and therefore the difficulty as to drainage need never arise. But these corporations are created chiefly for road making, and the discretion is vested in them as to when and where they will make roads. If the plaintiff's view were correct a most necessary road could not be made, and would have to be left in a dangerous or impassable condition because there were no means of drainage except by interfering with private rights. It was, however, contended for the plaintiff that the defendants are only empowered to make, improve, or maintain roads where they can do so without injury to the neighbouring lands, and that whenever it becomes necessary or expedient to carry the drainage off a road on to or over, or in any way to interfere with adjacent lands, the powers conferred by section 384 must be made use of. That section provides that the council may in and through any lands adjoining or lying near to any street or road within the municipal district make and open such ditches, gutters, tunnels, drains, and watercourses as to such council may seem fit, and all ditches, creeks, gutters, tunnels, drains, or watercourses within or adjoining to the municipal district may make, scour, cleanse, and keep open, and for any of such purposes may enter upon any lands, and compensation is to be made for any damage which owners and occupiers may sustain through the exercise of any of the powers conferred. Two views have been suggested as to this section. One, that of the plaintiff, is that it is intended as the only means by which the councils can drain the roads on to or through adjacent lands. If the wording of that section had been that the council might make drains "on to or through" the lands adjoining there might be force in this argument, but the words are "in and through," and the introduction of the word "creek" in the latter part of the section, and the power given of scouring and cleansing both within and adjoining the municipal district, seem to me to point rather to a system of drainage than to road-making merely. And this construction contended for by the plaintiff might lead to very extraordinary results. Take the case of a creek which crosses a road. The councils could not, according to this view, allow a drop of water to run into this creek crossing the road without being held liable in damages, and restrained by injunction if any injury even to the extent of 1s. were thereby done to the adjacent land. In such a case, if the plaintiff is right the only legal way in which that road could be cleared from water would be by the councils making a drain, "in and through" the adjoining lands (probably alongside the creek) and paying compensation to the landowner for the land taken for the drain, and for the damage done thereby. It might thus cost an enormous sum of money to make the drain and to pay compensation, in order to avoid doing an infinitesimal injury

with the absurdity of an artificial channel side by side with the natural one. The other view of this section 384, as put forward by the defendants is that it is a discretionary power to be employed by them, mainly for the better drainage of roads, as they think fit, and that, so long as they are not actuated by malicious or oppressive motives, they need not use this power, no matter what injury the omission to use it may cause the proprietors of the land alongside a road, and no matter what quantity of water may be poured from their roads on to the adjacent lands. In my opinion this is the correct view of the operation of this section. It gives a power for the benefit of the public to be exercised at defendants' option, and I cannot find anything in the statute that imposes upon them any legal obligation to exercise that power for the protection of the plaintiff (see *Dunn v. Birmingham Canal*, L. R., 7 Q.B., at p. 262). I have already adverted to the nature of this country, and would consider to what the plaintiff's contention as to this section would lead. In the case of a dangerous piece of road that required making and draining, and which lay between two hills, and away from any natural outlet, there would be no means of getting rid of the water, except by taking it "in and through any lands adjoining or lying near to" the road. But when the water has been taken through those lands, where is it to go then? There is no power to take it through any lands not adjoining or lying near, and it would, according to the plaintiff, be actionable to take it into any lands whatever. So that when the councils had availed themselves of section 384, and had paid compensation, they might find themselves in a greater difficulty than before, unless the sea or some large river were near at hand. Thus the council might either have to leave a most important road untouched or else go to an enormous expense in making drains through lands and paying compensation even in cases where the injury to the land by the water would be almost nominal, and then find matters as bad as ever. It has been urged that if the defendants are only to use the power given by section 384 at their absolute discretion, it follows that the Legislature will have authorised them to drain their roads on to a man's land and ruin it, without paying any compensation, and that in this view the council might indirectly take all the adjacent land by covering it with water from their road and pay nothing, while if they were to take an inch of the soil directly for draining the same road, compensation follows. Undoubtedly such a case of hardship might arise. But I can see no difference between the hardship in such a case and the hardship of injuring the value of a man's land by raising the road in front of it, and so destroying the access thereto, which this Court has decided may be done with impunity under this same act (*McDonald v. Coburg Shire*, 13 V.L.R., 268). Besides assuming *bona fides* in the municipal bodies, as we are bound to do, such a case could arise very rarely, and it is impossible for the Legislature to provide for every case that may arise. It is probable, however, that the true answer to such a case, if it did arise, would

be found in an attack upon the *bona fides* of the council. In the possible but scarcely probable case of the drainage of the district being taken on to one man's land and left there, to convert his property into a swamp, if there were no urgent necessity for such a course, it is not at all unlikely that fuller investigation would disclose facts sufficient to justify the conclusion that the council was acting in an arbitrary or malicious manner, and so as not to be protected. But assuming an honest exercise, without negligence, of the admittedly discretionary power of making a road, any hardship inflicted thereby is not, in my opinion, a ground for the interference of this Court. Even if it were correct that in such a case the landowner could not possibly get rid of the water so thrown upon his land, I would still consider it an evil which the Legislature intended him to endure; but by means of the Drainage of Land Act he could discharge this water, though it might be with expense and difficulty to deal with that channel, and they had also power to deal with that channel so as to keep it in a fit in some instances. It was further urged by the plaintiff that in any event there was a duty cast upon the defendants to exercise their powers under section 384, when, by a reasonable use of such powers, the injury to the plaintiff might have been prevented. In support of this view reliance was placed upon certain portions of the judgments in *Geddis v. The Bann Reservoir* (3 App. Ca., 430). There are undoubtedly some very strong passages to be found in the judgments in that case. But all these remarks must be taken in connection with the subject matter of the judgments. The defendants there had power to turn water into a certain channel, and they had also power state to receive such water without injury to anyone. Having used the first power they failed to keep the channel free, and so injured the plaintiff's land, and then unsuccessfully contended that the "Legislature had authorised work from which after it was executed and constructed, extensive damage of a kind not incident to, or necessary for, the undertaking might from time to time be done to the plaintiff's and to others' private property" (per Lord Selborne, p. 454). The present is, I think, a very different case. Here the defendants may make, improve, and maintain the roads, and it may well be that if they made a road but left it in a dangerous state an action would lie, if a jury should find on proper evidence that they might have prevented injury to a person lawfully using the road by a reasonable exercise of the powers conferred by section 384. But I cannot understand how this principle can apply in the case of adjacent landowners. The injury to them would not be prevented by anything that the defendants could do upon the road itself, but only by undertaking a new and independent work; and, as I have already pointed out, though this new work might remove the injury from one man it would in most cases only end in placing it upon someone else. In order to determine whether or not a body such as the defendants in this case is guilty of negligence in not preventing possible injury by the reasonable exercise of powers purely

permissive, we must look to the purposes for which they have been given those powers. If the powers have been given with the object that they should be used whenever a reasonable user of them would prevent injury from following upon the exercise of other powers, then non-user may be lawful or not according to circumstances. In the illustration that has been put of power given to make a railway between two points through private property with another power for compulsory taking of private property, I should agree that the two powers were to be exercised together. But if the power given was to make a railway or do other work on property not private, then the power of compulsory taking might be purely discretionary according to the purposes and scope of the principal power. The true rule as to this depends, I think, upon the nature and object of the power which the defendants have failed to use. A permissive and enabling power may be coupled with an obligation to use it *Julius v. Bishop of Oxford*, 5 App. Ca., 214, but it lies on those who contend that an obligation exists to exercise such a power to show in the circumstances of the case something which creates this obligation (id. at p. 223). So that the burden is shifted on to the plaintiff in this case, and in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can show that the statute under which they act imposed upon the defendants a duty towards himself, which they negligently failed to perform (*Sanitary Commissioners v. Orfila*, 15 App. Ca., 400).

"The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract. Negligence is simply neglect of some care which we are bound by law to exercise towards somebody." (*Thomas v. Quartermaine*, 18 Q.B.D., at p. 694).

To make the defendants liable in this view they must have failed in the performance of some duty which they owed to the plaintiff. What is that duty and how does it arise? Was there in this case any duty cast upon the defendants towards the plaintiff to exercise their powers under section 384, or was there anything in the nature of the thing empowered to be done by that section, or in the object for which it is to be done, which makes it the duty of the defendants to exercise that power generally? Looking at the section, I think that the power given by it (like the powers given by the cognate sections 385 and 386) was given mainly for the purpose of making, improving, and maintaining roads, and is to be exercised for the benefit of the general public, and not for the protection of any adjoining landowner; and I can see no reason for supposing that the Legislature intended that the councils must use this power either to prevent injury to adjacent land or as the only means of draining roads. An action cannot, I think, be sustained which is founded upon the non-exercise of a power for a purpose which the Legislature never contemplated, and I think that *Geddis's* case, and the remarks therein, are in accordance with this view, inasmuch as the power of cleaning and scouring the channel

could only have been given in that case for the purpose of enabling the other power to be properly executed. I think, therefore, that in this case there was no question as to reasonable user to be left to a jury. The point arising in this case has been before this Court on more than one occasion, and was expressly decided in *Shire of Ballarat v. Beaton* (3 V.R., 163). There the council made a drain alongside the road, the effect of which was to concentrate the water at a certain place on the road. No provision was made for the discharge of the water, but it overflowed the drain, and ran over the plaintiff's land, and injured him. The Court held that the plaintiff had no cause of action, because the defendants had merely done those acts which the law authorised them to do, and had done those acts properly. It was contended on this appeal that this decision is erroneous and ought now to be reversed. That case was decided in 1872, and shortly afterwards, in 1874, the Legislature dealt with the whole subject of local government, and not only did they not make any alteration that would throw any doubt on this decision, but words are introduced into section 384 (which corresponds with the previous section 309) that make the power of the council more a matter of discretion than ever. I do not say that this is in any way conclusive as to the correctness of the decision, but it ought not to be without weight:—

"Where an act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent act in *pari materia* use the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption the act should be so construed even if the words were such that they might originally have been construed otherwise." (*Jones v. Mersey Dock Company*, 35 L.J.M.C., at p. 15 and 16, per Blackburn, J.)

This consideration, and the fact that the judgment in *Beaton's* case had been acted upon for so many years, have gone far in my mind to counterbalance the extremely strong arguments deducible from the history of the legislation upon this subject. The whole matter to me has presented itself very much as a choice of evils. I am perfectly conscious that the interpretation which I think correct might work injury to individuals. The contrary view, however, would, in my opinion, render difficult, costly, and in some cases impossible, the performance by these local corporations of the duties which they had been created to perform. I can conceive that the Legislature meant that roads should be drained even at the risk of creating an easement over adjoining lands. I am utterly unable to imagine, however, that any legislative body could bring a corporation into existence for the express object of attending to the roads, and give no other power of draining those roads than by such a cumbersome mode as that pointed out in section 384 of the Local Government Act. I am confirmed in this view when I remember that these councils have only a limited rating power, so that expense is a great object to them, and that the Legislature has in certain sections carefully protected private rights, against the

exercise of some of the powers conferred upon these bodies, while remaining silent in this particular instance (see, amongst others, sections 385, 386, 388, 440, 443, and 444). I therefore concur with his Honour the Chief Justice in thinking that this appeal should be allowed with costs, and judgment entered for the defendants, with costs.

Solicitors; for appellants (defendants), *Fink, Best, and P. D. Phillips*; for respondent (plaintiff), *Cusey and O'Halloran*.

IN CHAMBERS.

(Before a'Beckett, J.)

HARLEY V. HARLEY.

21st. Octr.

Marriage Act 1890 (No. 1166) sec. 78—Divorce Rules 1885, r. 6—An order excusing the petitioner from making any person a co-respondent to the petition cannot be obtained until after service of the petition on the respondent.

Application on behalf of the petitioner (the husband) in a divorce suit for an order excusing him from making any co-respondent to the petition.

Mr. Anderson to oppose. There is a preliminary objection. The respondent has been served with this summons but has not been served with the petition. She is therefore not yet a party to the proceedings.

Mr. Forlonge in support. The practice seems to be unsettled.

HIS HONOR said:—Rule 6 of the Divorce Rules 1885 provides that a respondent must be served with a summons of this nature. I am of opinion that inasmuch as she has not been served with the petition she is not a party to the suit and hence this summons cannot be served upon her. I adjourn this summons for a week to enable the petitioner to serve the respondent on the petitioner paying L3 3s. Od. costs to the respondent.

Proctors for petitioner, *A. W. Fergie*; for respondent, *J. E. Dixon*.

PRACTICE COURT.

Before a'Beckett J.

IN RE ROYAL LAND COMPANY LIMITED, EXPTRE.
IMPERIAL BANKING COMPANY LIMITED.

21st Octbr.

Companies Act 1890 (No. 1074), ss. 128, 129.—A person who stands neither in the relation of creditor nor contributory to a company in the course of being voluntarily wound up cannot obtain an order to set aside the return of the liquidator.

Motion on behalf of the Imperial Banking Company, Limited, for an order setting aside the return of the liquidator of the Royal Land Company, Limited, on the ground that the affairs of the latter company had not been fully wound up.

It appeared that in 1888 the Royal Land Company, Limited, disposed of all its assets which consisted of land and contracts of purchase for land to the Imperial Banking Company, Limited. The memorandum of association did not authorise the latter company to purchase land. In August, 1891, a shareholder commenced an action against the directors of the Imperial Banking Company for a declaration that the purchase was void, and for a return of money paid.

Since the action was commenced the Imperial Banking Company, Limited went into liquidation. The liquidator was desirous of preventing the Royal Land Company, Limited being finally wound up so as to retain his right of action against the Royal Land Company Limited in the event of the action of the shareholders proving successful.

Mr. Hayes in support. By section 129 of the *Companies Act 1890* the company after the expiration of three months from the date of the registration of the return of the liquidator will be absolutely dissolved, therefore the applicant company will, if the return be not set aside, be debarred from any right to claim indemnity from the Royal Land Company, Limited, if the shareholders' action should be successful.

Mr. Weigall, for the Royal Land Company Limited, to oppose. There is no general jurisdiction in the Court to grant an application of this sort on behalf of a person who says he may be a creditor. The liquidator has disposed of the assets as far as he can realise them, he has got in the calls as far as he can enforce them, and has paid the debts as far as he is aware of them and therefore the company so far as the liquidator is concerned is wound up. *In re London and Caledonian Marine Insurance Company*, 11 Ch. D. 140, sec. 131 of the *Companies Act 1890* provides that the voluntary winding up of a company shall not bar the right of a creditor to have the company wound up by the court. If the applicant company be a creditor it should proceed under that section if it wish to prevent the company being wound up voluntarily.

HIS HONOR said:—In this case an application is made to set aside certain proceedings which on the affidavit of the applicant appear to have been taken under a voluntary winding up. The ground of the application is that some proceedings have been commenced by a third party against the directors of the applicant company which has had dealings with the company now being voluntarily wound up and that the success of the third party in those proceedings may alter the mutual relations of the two companies as it may give a right to the applicant company to make a claim of some sort against the company which is being wound up. In the first place I think I have no jurisdiction to interfere in a voluntary winding up except in so far as the Act authorised the Court to interfere. It is not suggested that there is any provision in the Act which enables a person standing

neither in the relation of creditor nor contributory to the company in course of being wound up to call upon the Court to exercise its jurisdiction. In the second place even if I had jurisdiction I think this would not be a proper case in which to exercise it. The regularity of the winding up proceedings is admitted. The very proceeding relied upon is one which does not profess to affect directly the company being wound up; it is merely said that this company might have a claim made against it by the applicant company in the event of an action brought by a third party against the applicant company proving successful. I see nothing to prevent the company being wound up from being made a party in such action. I dismiss the motion with costs.

Solicitors for applicant *Attenborough, Nunri and Smith*; for respondent, *Higett and McLaughlin*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., a'Beckett and Molesworth J.J.)

RE KNIGHT.

Sept 30th.

Practice Probate—Executors residing out of the jurisdiction—Bond—Powers of Court of Probate.

Section 20 of the Supreme Court Act 1890, impliedly empowers the Court of Probate to require security to be given in any case, or class of cases in which the rendering of accounts by an executor could not readily be enforced unless security were given, or, in which, for any other reason it should seem to the Court, that such an order would be reasonable and necessary.

Appeal from Hood, J. [See 12 A.L.T. 205.]

This was a motion for grant of probate of the will of the late Robert Knight to the executors named in the will. The executors both resided at Euston, in New South Wales. In the application for grant of probate it was also sought to dispense with the bond and sureties ordinarily required in the case of executors living out of the jurisdiction of the Court. Hood, J., however, only granted probate to the executors on their entering into the usual bond. From this decision the applicants appealed.

Mr. O'Hara Wood, in support.—The office of executor is one of private trust; the title of executor is derived from the will of the testator and not from the Court; *Hensloes case* 9 Co. 38a. Probate is only evidence of an executor's title, but is the only evidence any other Court will recognise; accordingly probate being a necessity by law for an executor to have, his right to obtain it is demandable. The power of the Probate Court under Section 20 of the Supreme Court Act 1890 is similar in all respects, except as to realty, to that of the Ordinary in England and, there the executor's claim to probate from the Ordinary has been enforced by *mandamus*; *R. v. Raines*, Lord

Raymond 361; *R. v. Bettesworth*, Strange 857; these are cases, indeed, in which the executor was within the jurisdiction of the Court; if, however, he is beyond the jurisdiction, there is no law or rule of Court that gives the Probate Court power to exact security from him. There is no analogy between the offices of administrator and executor, but even in the case of an administrator, there is express statutory authority for requiring a bond.

Cur. adv. vult.

HIGINBOTHAM C. J.—This is an application by way of appeal under order 58 rule 10, from a decision of Hood, J., sitting in the administration of the probate jurisdiction of the Court. The executors named in the will of the testator, William James Rockett, station overseer, and John McLeod, stock inspector, applied for probate in the usual form. Their affidavit shows that the will was executed in the presence of witnesses resident at Euston, in the colony of New South Wales, and that the affidavit was sworn by the executors at the same place before a commissioner of the Supreme Court of Victoria for taking affidavits. The Court in several instances for many years past has required security in cases where the person applying for probate has not described himself in his affidavit as a resident in Victoria, or where by the jurat it has not appeared that he is a resident Victorian. In the present case the Court granted the application for probate, and following the prevailing practice, it further ordered that the executors should execute such bond and find such sureties for the due collecting, getting in, and administering the real and personal estate of the deceased as is usual upon the grant of administration, and as is provided in sections 15 and 16 of the Administration and Probate Act 1890 to be made and found by persons to whom administration is granted. Objection is now for the first time taken to this further order as having been made without jurisdiction, and it is contended that in the absence of a rule of court requiring security, the executors, although not resident in Victoria, are entitled as of right to probate without executing a bond and finding sureties, and that the practice referred to is unauthorised and wrong. The existing jurisdiction and practice of the Supreme Court in granting probate are founded upon the Act 15 Vic. No. 10, section 15, which came into force on January 6, 1852. This Act has been repealed and re-enacted with the alterations rendered necessary by later legislation, and is now in force as the 20th section of the Supreme Court Act 1890. The latter part of this section is in the following terms:—

"The Court shall have power and authority to require, hear, examine, and allow, and, if necessary, to disallow and reject, the accounts of the persons to whom probate may be granted and letters of administration committed, in such manner and form, and as fully and amply to all intents and purposes whatsoever, as might have been done in the province aforesaid at such date—(that is to say, in the province of Canterbury on the 6th day of January, 1852)—subject, nevertheless, to such orders and directions as may be made by the Court, either generally as applicable to all cases, or specially with reference to any case in particular, or to such rules of Court as may be made as hereinafter provided."

(As to which see section 27, d.) Whether the power

existed in the province of Canterbury, at the date mentioned, to demand from an executor security for the performance of his duty to account is not very clear. Mr. O'Hara Wood, who argued ingeniously for the executors, contended that the power did not exist, and in support of this view he relied chiefly on the case of *The King v. Sir Richard Raines*, Lord Raymond, 361, and 1. Salk, 299. In that case a mandamus was directed to the Ordinary, Sir Richard Raines, to grant probate of a will to one Richard Watts, executor. The Ordinary made return admitting that the will was made, and that Watts was executor of it; that it was clearly and judicially proved that Watts was worth nothing, and had absconded for debts, and that therefore it was lawful for the Ordinary to defer the grant of the probate until Watts found sufficient security or "caution" to perform the intent of the will. The Court of King's Bench granted a peremptory mandamus for the grant of probate, because the Ecclesiastical Court could not require "caution" in that case for the following reasons:—

First. For when a man is made executor, nobody can add qualifications to him other than those which the testator has imposed, but he shall be he who and in what manner the testator shall judge proper. Second. The executor has a temporal right of which he is barred by the refusal of the probate, inasmuch as he cannot before probate sue in Westminster-hall. Third. There are now precedents in common law to warrant this, and the practice has been always contrary."

With regard to this case, it has been observed (Burn's Ecclesiastical Law—9 Ed., by Phillimore, vol. IV., p. 330, 331) that the adjudication proceeds upon the supposition that there is no canon law which requires "caution," that the authority of Lindwood alone, which was cited in argument, was not adjudged sufficient in this case; but that the constitution of Archbishop Stratford is undoubtedly a part of the canon law, and that constitution requires that "they," i.e., executors, "shall give sufficient security if need be;" also that "in the province of York bond hath been usually given." The constitution of Archbishop Stratford cited in the same volume, at page 327, is in the following terms:—

"After the testament shall be proved, according to custom, before the Ordinary, the execution or administration of any goods shall not be committed but to such as are able, and if need be shall give sufficient security to render a just account of their administration when they shall be thereunto duly required by the ordinary."

It thus appears that the third ground upon which the Court of King's Bench founded its decision in Raines' case proceeded upon an error of fact, and it would seem to be doubtful, to say the least, whether if this provision of the canon law had been known that judgment would have been given, and the power of the ordinary of the province of Canterbury to require "caution" would not have been recognised by the Common Law Courts at Westminster. The particular question involved in this case does not appear to have been again raised, necessity not requiring it, as the Court of Chancery, in consequence of this, and of another decision, *Hill v. Mills*, in which the King's Bench granted prohibition to restrain a suit in the

Ecclesiastical Court to revoke a probate on the new executor becoming bankrupt, assumed a new jurisdiction and appointed a receiver in cases where the executor became bankrupt or insolvent. (See Williams on Executors 7 Ed., vol. 1, p. 236). But the concluding words of the 20th section render it unnecessary, in our opinion, to determine this obscure question of ecclesiastical law and practice. The most ample power is here given to the Court by rules and general orders and directions applicable to all cases, and also by special orders and directions with reference to any case in particular to provide for the taking and examination of the accounts of executors as well as administrators. The due and effectual exercise of this power would necessarily require that the Court should have jurisdiction to order security to be given in any case or class of cases in which the rendering of accounts by an executor could not readily be enforced unless security were given, or in which, for any other reason, it should seem to the Court that such an order should be reasonable and necessary. The various cases in which security has been sometimes required and sometimes dispensed with on the application to this Court of non-resident executors appear to have been determined under and with the function of the authority here given. These decisions rest on the jurisdiction of the Court to give orders and directions in particular cases with regard to the accounts of persons to whom probate may be granted. They cannot be regarded, we think, as establishing a binding practice to require security in all cases where the executors are non-resident. In the absence of a general rule or order, the Court has a discretion in every case of application for probate to make, or not to make, an order for security, as the circumstances of the particular case may appear to require. In the present case the Court held that the terms frequently imposed in an application of this nature ought not to be dispensed with. We are of opinion that the Court had jurisdiction to make the order appealed against, and that its discretion is not shown to have been wrongly exercised. The application will be dismissed.

A'BECKETT J.:—Though I do not dissent from the view that authority for requiring security from an executor in special circumstances may be found in the concluding words of section 20 of the *Supreme Court Act 1890*, I think that Mr. O'Hara Wood has fully sustained his contention that this Court has altogether departed from English precedent in exacting security merely because an executor does not reside within its jurisdiction. In no case can I find that the Court in England has refused to grant probate or required security on this ground. As stated in Coote's *Probate Practice* (ninth edition, p. 42)—"The general indefeasibility of the executorship has been broken into to a small degree by the 73rd section of the *Court of Probate Act 1857*. By that section an executor may be passed over if he be resident out of the United Kingdom and there shall appear to the Court to be a necessity for or convenience in making a grant of administration with the will annexed to some other person." In a case decided upon this section, where the executor was

resident in Brussels, probate was granted to him, notwithstanding opposition, as the judge did not consider other objections sustained so as to bring the case within the act. Sir J. Hannen said—"This provision gives me power where the executor is resident out of the country, if I think he is by reason of his position there or his bad character unfitted to act, to exercise a discretion and refuse him the appointment. But it is plain I must not, merely because the executor is out of the country, lightly set him aside on the ground that some accusation has been brought against him, although in some cases I may do so. The executor's appointment is derived from the will. It is the intention of the testator that that particular person shall have control over his property after death, and although in certain cases the section empowers me to give another person such control, unless the Legislature thinks proper to arm me with a general power I ought not to assume it." In the goods of Samson, 3 L.R., P. and D. 48, our Court has shown solicitude for the rights of creditors not shown in England. As between *beneficiaries* and the testator, the responsibility of an improper or inconvenient appointment rests with him. If they lose through the bad selection it is not the fault of the Court which grants probate. As to creditors, those who have taken security over assets retain their security unaffected by the grant of probate and those who have taken no security have no direct rights over assets, and are not considered as entitled to protection in ordinary cases of probate. To my mind the only satisfactory ground for refusing probate to an executor is that which was given by the late Mr. Justice Molesworth in the case of *Slack, in re*; 8 V.L.R. I.P.M. 23, where it was obvious that residence in England would prevent his complying with the rule requiring exhibition of an inventory within three months. In such a case I should consider the refusal proper. No such difficulty exists in the case before us. As an executor visiting this colony from a foreign residence is permitted to take out probate, and as an executor who has proved in England can now become executor here by merely getting an exemplification sealed, and need not even swear an affidavit of compliance with the rules—to demand security from an executor merely because he lives across the border seems to me rather an anomalous proceeding. The practice of our Court began when we were comparatively isolated. We are now very differently situated, not only as to facilities of communication, but as to the enforcement of our judgments out of the colony. Requiring security from an executor resident out of the colony might compel him to buy security at a high price from one of the companies authorised to supply it or deprive persons interested under the will of the benefit of the testator's judicious choice of a competent and honest executor. Neither of these results would be desirable. I think that something more than mere residence outside our borders—some apparent inability to comply with our rules affecting executors—is needed to warrant the exacting of security as a condition to the grant of probate.

Proctor, *W. H. Lewis*

(Before Higinbotham, C.J., a'Beckett, and Hood, J.J.)

GREENING v. POLLARD.

16th Oct.

"County Court Act 1890" s. 51—*Action for tort—Application to remit—Powers of judge.*

In remitting an action of tort to the County Court, the judge is only empowered to name in the order a place for the trial of the action at which a County Court is from time to time held; he is not empowered to fix any particular Court to be held at that place.

Appeal from order of Molesworth, J.

An action had been instituted by one R. T. Greening against E. Fox Pollard to recover £500 damages for slander and libel. The defendant, before delivery of the statement of claim, applied under section 51 of the *County Court Act 1890* for an order for security or for the action to be remitted to the County Court. The order made upon the application was as follows:—"Upon hearing, etc., and upon reading, etc., I do order that unless the plaintiff shall within 7 days give full security for the defendant's costs to the satisfaction of the Prothonotary, or satisfy the judge that he has a cause of action fit to be prosecuted in the Supreme Court, all proceedings in this action be stayed, and that this action be remitted for trial before the County Court, Maryborough, at the next practicable sittings, and I do further order that the costs of this application be costs in the cause, etc." The plaintiff, within the prescribed period, applied to have the case retained in the Supreme Court, on the ground that the cause of action was fit to be tried in the Supreme Court. The order made on this application, from which the present appeal was, ran as follows:—"Upon hearing, etc., and upon reading, etc., I do order that the application be dismissed with £3 3s. costs to be paid by the plaintiff to the defendant or his solicitor, and I do further order the action to be tried at the sitting of the County Court to be held at Maryborough, commencing on the 16th July 1891 etc."

Dr. Smith for the appellant.—The judge is only empowered by section 51 of the *County Court Act 1890* to name a County Court; he is not empowered to fix the date on which the action is to be tried in the Court; that is the province of the registrar of the County Court.

[He was stopped by the Court.]

Mr. Anderson for the respondent.—Admitting that the order appealed from is bad in so far as it fixes a date, the first order was subject to the same defect, inasmuch as it directs the case to be tried at the "next practicable sittings;" consequently, if the plaintiff desired to appeal, he should have appealed from the first order, and not, as he has done, from the second order.

Per Curiam.—Appeal allowed with costs. The words from "I do further order" down to "16th July 1891," occurring in the second order from which

the plaintiff had appealed, to be struck out.

Solicitors.—For plaintiff, *Gill* for *H. S. Barrett* ; for defendant, *Major* for *Warton*.

(Before Higginbotham, O.J., a'Beckett and Hood. J.J.)

RE EBSWORTH EX PARTE TOMPSITT.

Oct. 15th, 16th, 20th.

Contempt of Court—Article in newspaper—Pending a action.

In determining whether the discussion in a newspaper of a pending action amounts to a contempt of court, the court must come to the conclusion that the fair hearing of the action will be prejudicially affected. A "mere tendency" to affect such fair hearing is not sufficient. It must be reasonably probable that an injustice may be done to one or other of the parties to the action.

Motion referred to the Full Court, on behalf of Henry Thomas Tompsitt for an order that a writ of attachment do issue against Alfred Martin Ebsworth for his contempt of court in printing and publishing in the *Argus* and *Australasian*, of which papers the said Ebsworth was printer and publisher the articles set forth below. The facts of the case were as follow :—

An action had been instituted by Henry Thomas Tompsitt (trading as Roche Tompsitt and Co.) against Wilson and Mackinnon (proprietors of the *Argus* and *Australasian* newspapers to recover damages for libel. The statement of claim set out the libel; the defendants, in their defence, alleged the absence of actual malice and gross negligence; they also pleaded an apology in addition they paid into court £25. A verdict was found for the defendants, and the presiding judge (Webb, J.) directed judgment to be entered for the defendants with costs, the plaintiff to be at liberty to take out the money paid into court. The plaintiff, subsequently, (on August 27th, 28th) moved for a new trial (sec. 13 A.L.T. 55) his grounds being as follow: (1). That the verdict was against the weight of evidence. (2). That the verdict was contrary to the evidence. (3). That the judge misdirected the jury by directing them as follows: " Mere untruth is not evidence of malice unless it is coupled with proof that the defendant knew when he published the libel that it was untrue; therefore you will have to consider whether the defendants themselves, or those who managed their newspaper knew that the statements of facts in this article were untrue." (4). That the judge also misdirected the jury by directing them as follows: " If you find that in your opinion there was no personal or actual malice, if you find there was no gross negligence and you find that the apology was sufficient, and published in such a manner as to satisfy the requirements of the case, then you will find for the defendants." (5). That the judge also misdirected the jury by directing them as follows: " I will recapitulate the points, if you are of opinion that there was no malice, and no gross negligence, and there was a sufficient apology you will find for the defendants; if you

are of opinion there was either actual malice or gross negligence and the apology was not sufficient, then you will find for the plaintiff; in that latter case you will assess the amount of damages which you think the plaintiff was entitled to, but utterly irrespective of the amount paid into court." The Full Court granted the motion for a new trial on the grounds of misdirection raised in (4) and (5) On the 4th Sept. after the grant of the motion for a new trial, the following article appeared in the *Argus*. " The degree of liberty fairly and safely permissible to " newspapers in dealing with matters of public interest " is a question of such far reaching importance that we " shall make no apology for referring to the principles " of the law of libel in Victoria as deducible from the " recent judgment of the Full Court in the case of " *Tompsett v. Wilson and Mackinnon* and from pre- " ceding local decisions. As to the merits of the " action named, in so far as they are still *sub judice* " under the order for a new trial, and particularly as " to the adequacy of the money paid into court to " meet the damage alleged by the plaintiff we especially " refrain from expressing any opinion. Those we " fully recognise as issues which in the turn events " have taken must be dealt with by a future jury, " unprejudiced by comment of ours. Respecting the " abstract reasoning, however, that has brought about " another trial, which is, unhappily, in full accord " with the tendency of earlier Victorian rulings, we " not only feel under no bond of silence, but we see a " distinct duty of protest on behalf of the press in " general.

" It appears to us that in administering a law so " powerfully punitive as that relating to newspaper " libel the canons of interpretation ought to be from " time to time enlarged with special regard to the " practical surroundings of modern journalism; that " in fact the measure of liability for bona-fide mistake " should be in keeping with the difficulty of avoiding " mistake. To apply to the involuntary errors of a " newspaper, committed under pressure of the exigen- " cies of prompt and regular publication, the strict " rules of responsibility which properly govern the " act of an individual who leisurely writes and pub- " lishes defamatory statements, is a violation of the " first principles of justice and common sense. We " do not suggest for one moment that a journal should " be permitted to spread abroad untrue assertions, and " then absolutely shield itself behind an indifferent " plea of haste and difficulty of avoidance, nor would " we deprive of just reparation any person suffering " wrong through the press. We ask for no license, " but we do claim an appropriate indulgence. That in- " dulgence, that consideration for the incessant perils " standing in the way of a newspaper seeking to expose " what it honestly thinks a public grievance, is pre- " cisely what was not, in our opinion, shown by the " Full Court last week. In America the courts have " gone so far as to decide that a jury may take into " review the hurry necessarily incident to the prepar- " ation and publication of a daily newspaper, as where " an article is brought in at the last moment before go- " ing to press. Is it unreasonable to say, that our

"own judges might conscientiously and properly base their rulings in regard to newspaper libel upon similarly liberal and businesslike grounds? Should a new trial, in short, be ordered upon a mere technicality? Grant that a judge in directing the jury has put a view of the law which may be thought by the appellate court not absolutely correct, is the Bench to use no discretion as to whether the merits of the issue were not sufficiently before the jury for the purposes of practical justice? Are not the judges, in such circumstances, in fairness bound to ask themselves, as sensible men, if the special point as to which the primary judge may have made a technical slip was not present to the minds of the jurors when they retired to consider their verdict; and if it was, what more is needful? It is not a question of whether the jury came to the right or wrong conclusion, but whether they were seized of facts which enabled them to arrive at some conclusion. The wording of Order XXXIX, rule 6, of the Judicature Rules is, that no new trial shall be allowed unless the Court considers that "some substantial wrong or miscarriage" has been occasioned. Our plea is that the standard of interpretation adopted on this point by Mr. Justice Molesworth is one that should prevail in relation to all press libel actions, and that newspapers should not, by the effect of a strict and hard-and-fast literalism, be subjected to further costs and expenses when they have frankly admitted the mistake, published an ample apology, paid money into Court, and absolutely done all in their power to make amends. Technicality represents, not the living spirit of progressive and enlightened law, which is ever in favour of justice on the broad merits, but the relics of an odious special demurrerdom, which it was the main mission of the judicature system to purge out of existence.

"Nor are those who assert the claim of the press to intelligent consideration at the hands of the law and of the Courts speaking without book. The judges of this colony have, with a few exceptions, adhered to the narrowest traditions of the old law of libel when dealing with actions against newspapers, but the English Legislature and the English Bench have, with a generous and justifiable clemency, alike striven to recognise the pitfalls which peculiarly beset the journalist, and to lessen the ill consequences of his unwittingly falling into them. Ever since Fox's Act, in the time of George III, the Imperial Parliament has thrown around honest newspaper conductors an increasing measure of protection. Statute after statute has admitted the unique position of newspapers in regard to libel, and Lord Campbell's notable Act, which is known to lawyers by his name, declared as long ago as 1843 that absence of actual malice and gross negligence, coupled with suitable apology, should be available defences to the *bona fide* proprietor whose staff had accidentally made a slip in facts. The same legislation enabled him, if the circumstances seemed to call for such a step, to pay into Court any sum which he might consider necessary, in addition to apology, to

"recompense a plaintiff for any wrong done to him. Under the salutary provisions of Lord Campbell's Act in particular the judges at home have from time to time ameliorated the rigour of the common law touching newspaper libel, and to such an extent that previous decisions of a more severe type have repeatedly been disregarded in later cases by a bench that has shown its ability to appreciate and give effect to the embarrassing conditions of modern newspaper production. Even so recently as 1888 a fresh English statute was passed to further emphasise the determination of the British public that its press shall be free and unfettered at every step, provided it be innocent of malice and culpable neglect.

"We know of no reason why in these colonies, where the press has attained a level and a development that reflect aptly the intellectual vigour and advance of our people, justice should look with less kindly eye than in Great Britain and America upon unwitting lapses from the high standard of accuracy which all reputable newspapers endeavour and endeavour with such uniform success, to maintain. In the "Wrongs Act 1890" are included the principal provisions of Lord Campbell's Statute, and it is hard to see why, in administering the principles of limited newspaper liability in Australia, a harsher rule of technicality should be insisted upon than is observed in the birthplace of the law itself. What more can a newspaper do than apologise for its unintentional blunder, and pay into court such sum as will show the sincerity of that apology, no special damage being alleged? Recent English authorities distinctly affirm that the court cannot review or set aside the decision of a jury as to the sufficiency of an apology. Has not the Victorian Full Court done this exactly? We trust the day is not far distant when our judges will seek to apply to newspaper libels that liberal and progressive interpretation of the law which public servants performing an arduous office, and trying to perform it honestly, have on every moral ground a clear right to expect. The Queensland Parliament in 1889 passed a special act regulating the law of newspaper libel, and it would be well if our own legislature would follow an example at once enlightened and fair."

On the 5th September 1891 the following article appeared in the "Australasian."

THE LAW OF NEWSPAPER LIBEL.

"It is an old saying that the liberty of the people is in exact ratio to the freedom of the press, and the merest glance at the course of British history justifies the aphorism. From the abolition of the censorship of the press in 1695, up to the great emancipation of newspaper conductors under Fox's Act in the reign of George III, the progress of the press in its struggle for fair and generous treatment was comparatively slow, but since the early part of the present century no subject of similar public importance has obtained from the British Legislature a larger share of needful consideration, or has secured a greater

"proportion of remedial legislation. Statute after statute has borne witness to the anxiety of English statesmen to meet the public demand for free and unfettered newspapers, and to relieve their conductors from liability for errors of statement arising from mischance. Lord Campbell's Act in 1843 separated newspaper libels from the general class of defamatory publications by specially providing that absence of actual malice and gross negligence and suitable apology in a succeeding issue of the offending journal, combined with payment into court in proper cases of adequate compensation for injury inflicted, should be grounds of defence specially available to the press. Gradually the absolute privilege of newspapers in reporting proceedings in Parliament and before the judicial tribunals was established, so long as the record was fair; and at length, by virtue of amending acts extending up to the session of 1888, the entire irresponsibility of the press for publication of, and observation upon, any matter of public interest, provided the report or comment be fair and without malice, has been completely confirmed." The action of the Home Legislature has, in fact, been in keeping with the famous declaration of Lord Palmerston:—"If I were asked for a proof of the greatness and intellectual vigour of England, I should point, not to our buildings, enterprises, or public institutions but to a file of *The Times*."

"And scarcely less apparent than the kindly solicitude of Parliament has been the leaning of English courts towards a liberal interpretation of newspaper responsibility. Again and again have eminent judges, under the plea of privilege, held that statements reflecting upon individuals were justified by their important bearing on the public good. Privilege is, indeed, a shield practically created by the English Bench for the protection of bona fide "defamation," and most of all for the safety of the press. And, be it observed, the limits of privilege have been constantly enlarged, modern judges refusing to be bound by decisions arrived at under less favourable public impressions of the duties and liabilities of the press. The English judges have, in a word, seconded with cordiality the efforts of the Legislature, and have construed the law in accordance with the prevailing opinions of the day. With strong and resolute hand they have thrust aside that maze of technicality which obscured the law of five-and-twenty years ago, ministering indeed to the school-mens' instincts of subtle definition, but sacrificing on the altar of a needless precision every element of justice and fair play.

"Why, it may be justly asked, are not the principles of liberality thus adopted by both Parliament and the courts at home reproduced in these colonies? Why should the Legislatures of progressive communities, whose newspaper press is a theme of merited admiration, generally neglect to give to it the fullest freedom? And a still more pressing question—why does the bench in Australia lag behind its English model in breadth of view, in readiness to recognise peculiar functions and risks

"of modern newspaper production, and in anxiety to suit the law to the spirit of the times? So far as the Australian Parliaments are concerned, one notable exception must be made in regard to Queensland, the Legislature of which in 1889 passed a comprehensive act, based on the latest English libel legislation, and indeed, going beyond the actual limit of statute law at home. But, elsewhere the newspaper conductor must, so far as we have been able to ascertain, look for aid to no later law than that of Lord Campbell's Act, dating nearly fifty years back. Surely it is time for legislative action in order that the law of libel may be based in all these colonies upon the true appreciation of the daily and weekly difficulties which beset the path of the journalist under the pressure of the public call, for early news and for outspoken exposure and discussion of grievances.

"We have been led, in some measure, to renew our protest against the narrow interpretation of the law of newspaper libel, which has discouraged press enterprise and energy on too many occasions, by the circumstances attending the granting by the Supreme Court last week of a new trial in the action of *Rocke, Tompsitt & Co. v. The Proprietors of the Australasian*. About the issues involved in the proceedings it is not at present within our province to say one word, but we do venture to assert that had the liberal view of newspaper responsibility which prevails in England been taken here, the verdict of the jury, which is now upset, would have stood unimpeachable. The technical point on which we understand the order for a new trial to have been founded was, that the jury had not been expressly directed by the presiding judge to say whether the amount paid into court was a sufficient compensation to the plaintiff, or in other words, that they had not been instructed to assess the plaintiff's damage. Now, it is indisputable that, the fact of a sum of money having been paid in was before the jury, as also was the amount of that money, and it is surely stretching the net of technicality to an unwarrantable degree to say that the heavy burden and expense of a new trial must be undertaken, because the presiding judge did not in terms tell the jury what they already knew, or gave an interpretation of the law which may have been technically inexact, but was practically correct. The Judicature Rules expressly provide that no new trial shall be permitted unless there has been some 'substantial wrong or miscarriage.' Mr. Justice Molesworth adopting what seems the common sense view considered that the action had, as a matter of actual fact, been thrashed out, and he refused to certify that any wrong or miscarriage had occurred. His two colleagues, however, insisted on a stricter rendering of the law and sent the case to another jury. One might have supposed that when the jury found that the apology made was sufficient, and that there was no malice or gross negligence, it would be a permissible inference that they had considered the amount paid into court in arriving at that conclusion. We do not, however, desire to emphasise

"the action in question other than as illustrating a harshness of the existing law of newspaper libel, and proving the urgent necessity for a revision of its principles by the Legislature, and of a more generous and modern interpretation of those principles by the courts."

Mr. Isaacs (with him *Mr. Mitchell*) appeared in support.

Mr. Purves, Q.C., and *Dr. Madden* appeared to oppose.

Cur. adv. vult.

HIGINBOTHAM, C.J. (*dissentiens*).—I regret that I am unable to concur with my learned brethren in the conclusion they have arrived at in this case. The single question raised for our determination is a question of fact. The plaintiff, *Mr. Tomsitt*, has applied for a writ of attachment or other suitable punishment against *Mr. Ebsworth*, the printer and publisher of *The Argus* and *The Australasian* newspapers, on the ground that articles published in those newspapers on the 4th and 5th of September last are calculated to influence and prejudice the mind of the public against him as plaintiff in an action now pending, brought by him against the proprietors of those newspapers, and referred for a new trial by the Full Court in August 28. We are not called upon to determine what was the motive or intention of the writers of the articles or of the defendants. It may be that there was no intention to injure the plaintiff, or to prejudice the fair and impartial trial of the cause. But if the published articles should be found on examination to have a natural and probable tendency to produce those results by affecting, unfavorably to the plaintiff, or in favor of the defendants, the minds of any of those persons who may be required as jurors to try the issues, a contempt of court has been committed, and it is our undoubted duty, by punishing that contempt, to give to the plaintiff the protection asked for by the motion. In considering this question of fact the two articles may be treated as one. If they were not both written with the same pen they are identical in the views and in the conclusion they present, and in some of the significant phrases they employ. The line of argument in both is clear, and could be easily followed by anyone who took sufficient interest in the subject to read the articles. The judgment of the Court ordering a new trial furnishes the occasion and the subject of both articles; but the writers disclaim the intention of commenting on the pending litigation. They propose to consider the law of libel as it applies to the newspaper press in England and in Victoria. They proceed to urge complaints on behalf of the press against the Parliament and the courts and the judges of Victoria. Parliament, it is alleged, has improperly neglected to enact for Victoria recent remedial acts passed in England for the protection of newspapers. The courts and the judges of this country, it is asserted, still allow themselves to be fettered by technicalities which no longer prevail in England. Judges at home, it is said, have "ameliorated the rigour of the common law touching newspaper libel;" they have exercised "a gener-

ous and justifiable clemency," and have extended "an appropriate indulgence" to the claims of the press. The result, it is suggested, of the neglect to follow English example in "enlarging the canons of interpretation from time to time" with regard to newspaper libel, is "a violation" in Victoria "of the first principles of justice and of common sense." No explanation or proof is given in these articles of the expressions I have cited. To my mind they convey no meaning whatsoever, unless it be one imputing to English judges favor or partiality to the newspaper press which, of course, was not intended, and would be wholly unfounded. The argument of the writers of these articles returns finally to the point from which it started, namely, the judgment of the Full Court ordering a new trial of the action brought by the plaintiff against the proprietors of the newspapers. The judgment is cited as an illustration of the narrow and defective administration of the law of newspaper libel in Victoria, and it is alleged that the order for the new trial was based upon a mere technicality. This statement is incorrect in fact. The defendants claimed the right to determine for themselves the sufficiency of the amount they were allowed by the statute under which their defence to the action was pleaded to pay into court by way of amends to the plaintiff for the injury he had sustained by the publication of the admitted libel. The defendant's contention on this point was overruled, and it then became essential and material for the determination of the action that the case should be remitted to a jury. These articles are, in my opinion, plainly an appeal to the public for its sympathy on behalf of the defendants in the action. And if they had been published after an adverse final verdict and judgment, there is little doubt that complaint could not have been successfully brought against them in this Court by anyone. But the case is entirely different while the litigation is still pending. If it was not the intention, it is the natural and necessary tendency of these articles, in my opinion, to reverse the positions of the plaintiff and the defendants in the judgment of the public. The defendants by their own admission are wrong-doers; the plaintiff has suffered wrong at the hands of the defendants. But these articles represent the plaintiff as a person who has no meritorious claim, but only a claim founded on a so-called legal technicality, while the defendants are made to appear as innocent persons, whose legitimate rights are neglected by the Legislature, and are harshly judged by the judges of this Court. I entertain no doubt that these articles, appearing under the veil of unbiassed public criticism, would be likely to obtain very general assent, although they are, in fact, wholly undeserving of it, and whatever their critical merits or demerits may be, I think that the prejudice they are calculated to do to the plaintiff and to the plaintiff's rights in the action must be measured by the extent of their probable influence. I attach no great weight to the argument that these articles will probably be forgotten, and their prejudicial effect be dissipated, before the day of trial. An adverse prejudice, once estab-

lished in the mind, is not usually transient; it may continue long after its source has been forgotten, and after the reasons which seemed to justify it have been refuted. It may easily be revived and have powerful effect upon the mind, though the mind may not be even conscious of its existence. I should say that no jurymen who has read and has been influenced by these articles will be able within a measurable time to apply his attention to the consideration of the issues in this case with the same absolute impartiality as he would have done if the articles had never been published. Nor should a wrongdoer be allowed, in my opinion, to fix arbitrarily a limit of time after which he shall not be held responsible for the probable consequences of his wrong. I have arrived at the conclusion that these articles distinctly tend to prejudice, and that it is not improbable that they will prejudice the plaintiff and the fair trial of his cause against the defendants, and I am, therefore, of opinion that this motion in one or other of its alternative forms should be granted, and with costs against the publisher of the newspapers. As, however, my learned brothers are of a contrary opinion the motion will be dismissed, but without costs.

A'BECKETT, J.:—The articles which the plaintiff asks us to regard as contempt of court could only prejudice him in so far as they related to his action, and were calculated to prevent its fair trial. General observations on the law of libel and its administration here and in England, whether well or ill founded, would not affect him. The judgment which directed a new trial of the action, and was made the subject of comment in the articles complained of, was not unanimous. One member of the court, through concurring in the view that there had been misdirection by the judge at the first trial, was not satisfied that substantial injustice had been done, and therefore thought that a new trial ought not to be granted. In referring to the decision thus arrived at, both of the articles claimed that the merits of the action had been decided in favour of the defendants by the jury at the first trial, and that their verdict should not have been disturbed and a new trial ordered on a mere technicality. That which was called a technicality was the withdrawal from the jury's consideration of the question of whether or not the sum of £25 paid into Court by the defendants was sufficient amends to the plaintiff. Subject to this observation I cannot say that either article misrepresented any of the facts of the case, or commented upon them unfairly. The articles were only objectionable inasmuch as they favourably presented one side of a question pending between parties to an action waiting trial. Each was so written as to create the impression that the defendants had been hardly dealt with, and that all the merits were with them. An ordinary reader would not have observed that the sufficiency of the amount paid into Court had not been decided at the first trial, and if he entered the jury box at the second trial fresh from its perusal he would probably do so with a bias in favour of the defendants. There was, however, no chance of such an occurrence. When the articles were published it

was known that the new trial could not take place for at least two months. In view of the time of their publication and of the time at which the new trial was to be held, I think that they would not be likely to affect, and that they were not intended to affect, the minds of the jurymen who would be called upon to try the action, and, therefore, that Mr. Ebsworth should not be held to have been guilty of contempt in publishing them. Nevertheless, the plaintiff might reasonably have been alarmed by their publication, and felt it necessary for his protection to prevent the repetition of similar one-sided statements in reference to the pending action by opponents able to command the advocacy of two widely-read newspapers. Their repetition might justly be regarded as a contempt, for which an attachment should issue. When informed by the notice of motion that the plaintiff regarded the articles as likely to influence and prejudice the mind of the public against him, the defendants did not in any way intimate that they would abstain from publishing articles of the same tenor. For these reasons I think that though the motion for attachment should be refused, the plaintiff should not be ordered to pay the costs of his unsuccessful application.

HOOD J.:—The power which this Court possesses in cases like the present of punishing for contempt is founded solely upon a regard for the due and impartial administration of justice. When a case is pending before the Court a duty is cast upon the judges to ensure, as far as possible, fair play to the suitors, and any conduct that would unfairly affect the tribunal which has to decide the matters in dispute ought to be promptly repressed and punished. But in determining whether or not certain conduct amounts to a contempt the court must come to the conclusion that the decision of the case may be prejudicially affected, and each particular case must, I think, be judged upon upon its own particular circumstances. Although it is clear that if the conduct complained of "tends," or is "likely," or is "calculated" to prejudice a fair trial, the Court will interfere, yet a mere tendency is not sufficient. It must be reasonably probable, in the light of all the facts before us, that an injustice may be done to one of the litigants before this summary jurisdiction is exercised. The real question, therefore, for our determination is not whether the newspaper articles are objectionable or offensive or unfair in themselves but whether their publication, under the circumstances that exist, may, in our opinion, unfairly bias the minds of the jurymen who will try the action of *Tompsett v. Wilson*. To determine this, it is necessary first to consider the articles themselves, and then to look into any other facts that may or may not qualify or temper the natural meaning of the words used. The articles, in my opinion, are based upon a complete misapprehension of the judgment of the Full Court in ordering a new trial, and they also appear to overlook the important fact that it is the duty of judges to interpret the law and not to make it. Some prominence is given by the writer to the very peculiar and dangerous doctrine that the Court should show extra consideration and indulgence to a particular class of

litigants, and the word "technicalities" is used throughout in a sense far apart from the proper one. Indeed, I find it difficult to understand how any candid writer, possessed of the facts and knowing anything at all of the law, could honestly characterise the decision of the Court as technical. The decision proceeded upon the point that the jury had not been directed to find their verdict in accordance with the Act of Parliament. Although the defendants had admittedly libelled the plaintiff, a verdict had been found that they had done so without malice or negligence, and had duly apologised. This showed that in the opinion of the jury the defendants were not personally blameworthy. But the Act of Parliament requires more to be found before the defendants can be absolved. Money has to be paid into Court as compensation for the injury done to the plaintiff, and the jury has to assess the damage done to him by the libel. Upon this point there had been no finding, for the jury had practically been told that it was unnecessary for them to consider it. Now, I think it is manifest that although the jury might have found in the defendants' favour on this matter, as well as on the others, yet it is equally probable that they might have been of opinion, if they had considered the point, that the injury to the plaintiff was a very serious one, even though inflicted accidentally. As these damages had not been assessed, the plaintiff was entitled to a new trial, and in my opinion there is neither injustice nor technicality in awarding him what the law has so clearly allowed. But however this criticism might affect a lawyer's mind, we still have to consider in what way a man of ordinary intelligence having no special knowledge of the law, and unacquainted with the facts of this case would look upon these articles. His first general impression would be, I think, that there was an attack upon the law of libel and on the administration of that law by the Victorian judges. He would then see that the defendants were aggrieved because having obtained a verdict from the jury that verdict had been set aside upon a question of law and a new trial ordered. The reader might then come to the conclusion that this was a very hard case upon the defendants, and that the sooner the law was altered the better. It is also possible that he might form the opinion that the defendants had all the merits and the plaintiff none. This, I think, is the very utmost effect of these articles adverse to the plaintiff in this action, and assuming a man to enter the jury-box with this impression on his mind the plaintiff might be unfairly prejudiced. But it is necessary to consider the other circumstances of the case before we arrive at the conclusion that any harm will be done. The articles were published early in September, two months at least before the case can possibly be tried. Being published at that time, they would be read by men who could not have the faintest idea that they would be members of the jury to try the case, and the subject being of small interest to the ordinary citizen, I cannot think that any permanent impression would be produced sufficient to cause any honest man to swerve

even unconsciously, from his duty. The fact, too, that these articles are published by one of the litigants (though it might increase the punishment if I thought them harmful) goes far, in my opinion to destroy any injurious effect. If an influential newspaper were to embrace the cause of a litigant with whom the paper had no connection, articles written in that litigant's favour from an apparently impartial standpoint would have great weight. But when that same newspaper is urging its own case and detailing its own wrongs the average reader is quite able to discriminate and to discount liberally such interested advocacy. Regarding, therefore, these articles with the worst interpretation that has been suggested by the plaintiff (though I do not say that is my own view of them), but also considering the other circumstances and giving the jurymen credit for ordinary intelligence and an honest desire to do their duty, I do not think that these articles would have any effect upon the fair trial of this action, and so I agree that this motion should be refused, but without costs, for the reasons already stated by Mr. Justice a'Beckett.

Solicitors.—In support, *Eggleston, Derham & Martin*; to oppose, *Malleson, England & Stewart*.

PROBATE JURISDICTION.

(Before a'Beckett, J.)

IN THE WILL OF BLACKWOOD.

Sept. 24th.

The Court will order a foreign probate to be sealed with the seal of the Court though the only property of which the testator died possessed in this colony was trust property.

This was an application by the executors of the will of Richard Blackwood to whom probate was granted by the Supreme Court of New South Wales to have the probate sealed with the Supreme Court of Victoria. The registrar referred the matter into Court as he had some doubt whether the Court had jurisdiction to order a probate to be sealed where the estate consisted wholly of trust property.

The following affidavit was filed in support of the application.

Affidavit of Robert Simson.—That now produced to me and marked with the letter "A" is the probate of the will of the above-named deceased granted by the Supreme Court of New South Wales in its ecclesiastical jurisdiction. (2.) That the said grant of probate has not been revoked. (3.) That John Hutchinson Blackwood of Melbourne, in the colony of Victoria, at present of No. 52 Lombard-street, London, England, Esq., and myself this deponent to whom such probate was granted are desirous of having the said probate sealed with the seal of the Supreme Court of Victoria under the provisions of the *Administration and Probate Act 1890*. (4.) That the said deceased did not leave any real estate in the colony

of Victoria but left personal estate in the said colony not exceeding in value the sum of £2,550. (5.) That the said sum of £2,550 is represented by an indenture of mortgage under the general law and an instrument of mortgage under the provisions of the *Transfer of Land Statute*, each dated the 14th day of September 1877 from George John Wilson to the said deceased over certain freehold land in the parish of Mepunga in the County of Heytesbury, to collaterally secure the payment of the sum of £2,550 on the 28th of August 1882. (6.) That the said sum of £2,550 secured by the said mortgages was held by the said deceased as trustee for one Thomas Lake Crommelin, of Albury in the said colony of New South Wales, and the said deceased had no beneficial interest whatsoever in the same.

Mr. Weigall in support of the application. This application is confessedly made in order to enable the executors to make title, and the registrar considering that the point was a new one has referred the matter into court. I submit no matter what estate was vested in the testator whether merely beneficial or otherwise his executors are entitled to probate.

MR. JUSTICE A'BECKETT:—I think the application ought to go. The order will be that (subject to any questions as to duty, etc.) the seal of the Court be affixed.

Proctor, *Blake and Riggall*

(Before a'Beckett, J.)

IN THE ESTATE OF SMITH ELLIS.

Sept. 10th.

Dispensing with sureties. A applied for a grant of letters of administration dispensing with the sureties, and supported her application by an affidavit by herself stating that there were no debts, and that she and the only other next of kin (a son of the deceased) had agreed on a division of the estate, and by an affidavit by the son the only other next of kin giving his consent to the grant without such sureties. Held that the son might be accepted as the only surety, and that he need not be required to justify.

This was an application that letters of administration of the estate of Smith Ellis, deceased, be granted to Frances Ellis the widow of the deceased, and that the sureties to the administration bond be dispensed with.

The affidavit in support of the application for letters of administration was in regular form.

The affidavits in support of the application to dispense with sureties were the affidavit of the applicant, Frances Ellis, which stated that the only person entitled to share in the estate were the deponent herself and Richard Smith Ellis, the only child of the deceased, that she and Richard Smith Ellis had executed a mutual deed of agreement, under which they had agreed on a division of the estate, that the only debts due by the deceased, amounting to £72 19s. had all been paid. And the affidavit of Richard

Smith Ellis, the only child, which stated that he was over twenty one years of age and consented to a grant of letters of administration to the applicant (his mother) dispensing with both sureties to the administration.

Mr. Lewis in support of the motion. I would ask that the usual sureties be dispensed with. The affidavits show that there are no debts, and the only party, other than the administratrix, interested in the estate, consents to such a course.

MR. JUSTICE A'BECKETT.—I shall grant the administration, but shall not dispense with sureties as asked. The son may be accepted as the only surety, and he need not be required to justify.

Proctor, *H. McKinley*.

SUPREME COURT SITTINGS.

(Before Hodges, J.)

DANBY V. AUSTRALIAN FINANCIAL AGENCY AND
GUARANTEE CO. LTD.

July 24th—28th.

Bill of Sale, consideration, secret condition.

W. gave a bill of sale over his stock-in-trade to A Co. having shortly prior to the giving of the same obtained from A Co a guarantee for an overdraft for £1,000, but such guarantee was not strictly agreed to be put into the bill of sale as part of the consideration therefor, but was something collateral. Held that though the giving of such guarantee no doubt gave W. an other motive for signing the bill of sale, which he probably would not have signed without it, yet such guarantee was no part of the consideration for the bill of sale and therefore it was not necessary to include it in the notice of intention to file the bill of sale.

W. gave a bill of sale over his stock-in-trade to A Co. in which there was a condition that his stock was not to be reduced below £9000, but there was also an understanding between the parties that A Co. would have no objection to the stock being reduced below that amount if all monies received for the sale of any stock reducing the stock below that amount were paid to the credit of A Co. Held that this was not a secret condition invalidating the bill of sale.

This was an action by the trustees of an insolvent estate, seeking to set aside a bill of sale given by the insolvent to the defendant company, on the ground that the bill of sale did not express the true consideration for which it was given, and on the ground that the notice of intention to file the bill of sale did not set out the true consideration for which the bill was given.

The statement of claim set out (1.) The plaintiffs are the duly appointed trustees of the estate of one, Sven Nilsson Wiedemann, of Fitzroy, in the colony of Victoria, carriage builder, trading as "G. F. Pickles & Company;" the said estate of the said Sven

Adolph Nilsson Wiedemann was duly sequestered by an order nisi obtained by Messrs. Morris & Meeks on the 7th of March, 1890, re the petition of Messrs. Edward Keep and Co., and was made absolute on the 12th June, 1890. (2.) The defendants have detained and still detain from the plaintiff as such trustees as aforesaid certain property being part of the said insolvent estate of the said Sven Adolph Nilsson Wiedemann, and have refused to give the same up to the plaintiff.—Particulars of the said property—the book debts, chattels, effects and property matters and things whatsoever mentioned or referred to in or by what purports to be a bill of sale from the said Sven Adolph Nilsson Wiedemann to the defendants dated the 22nd day of August, 1889, and filed the 21st day of September, 1889, and also all the other book debts, chattels, effects or property, matters or things in connection with the said business of Sven Adolph Nilsson Wiedemann, whether existing before or after the filing of the said bill of sale, and also the lease of the various premises upon which the said business of the said Sven Adolph Nilsson Wiedemann was carried on. (3.) The defendants have converted to their own use and wrongfully deprived the plaintiff as such trustees as aforesaid of the said property mentioned in paragraph 2 hereof. (4.) The defendants pretend that by the said alleged bill of sale the said Sven Adolph Nilsson Wiedemann had assigned to them the property mentioned in paragraph 2 hereof, and also the good will of the said business and the trade names used in connection herewith of "G. F. Pickles and Sons" and "G. M. Pickles and Co." And that they are thereby entitled to hold the same as against the plaintiffs as aforesaid, but the plaintiffs say that the said alleged bill of sale is null and void as against them as such trustees as aforesaid, and that it is inoperative and has no validity either at law or in equity upon the following grounds: (a) That no notice of intention to file the same containing a statement of the particulars in the first schedule to the Act No. 557 was lodged in the office of the Registrar-General 14 days before the filing of such bill of sale or at all. What purported to be such notice of intention filed as aforesaid was defective in that it did not truly set out as provided by the said schedule or at all what was the true consideration for the said alleged bill of sale. (b) The said alleged bill of sale itself did not truly set out what was the true consideration for the giving thereof. (c) The recital in the said alleged bill of sale—to wit—that one George Mackay Pickles was then possessed of or was entitled to the good will of a carriage manufactory heretofore carried on by him under the style of "G. F. Pickles and Sons," together with the book debts, chattels, effects, and things mentioned and set forth in the first schedule thereunder written or thereunto annexed, together with a leasehold, estate, or interest in the Latrobe-street premises, and as occupied by him in connection with the said business was false in fact to the knowledge of the defendants at time they inserted the same. (d) The said alleged bill of sale was under and subject to a condition not contained in

the body thereof, and such condition was not written on the same paper or parchment on which such alleged bill of sale was written before the time when the same or a copy thereof was filed.—Particulars of such condition.—A condition to the effect that the said Sven Adolph Nilsson Wiedemann was not to reduce stock below £9000 unless the proceeds of all goods sold below that value was at once paid to the defendants. (5.) The plaintiffs as such trustees as aforesaid claim (i) under paragraph 2 hereof delivery up of the said property therein mentioned or alternatively £30000 damages. (ii) Under paragraph 3 hereof £30000 damages. (iii) Under paragraph 4 hereof (a) a declaration that the said bill of sale is null and void as against the plaintiffs and that it is inoperative and of no effect either at law or in equity. (b.) A declaration that the plaintiffs are entitled as such trustees as aforesaid to all the property mentioned in paragraph 2 hereof and to the goodwill of the said business and to the trade names of "G. F. Pickles and Sons" and "G. M. Pickles and Company." (iv) An injunction to restrain the defendants from further carrying on the said business or from dealing with the said property. (v) A receiver, if necessary. (vi) Accounts and enquiries of all the defendants dealings and transactions in connection with the said business since they have taken possession thereof.

The defence states (1.) It denies it detained or now detains any of the said property referred to in paragraph two of the statement of claim. (2) It denies that the said property or any of it belongs to the insolvent estate of the said Sven Adolph Nilsson Wiedemann. (3.) The said property is the defendant's. (4.) It denies that it has converted to its own use or deprived the plaintiffs wrongfully or at all of any of the said property. (5.) It admits that it claims that by the said bill of sale the said Wiedemann assigned to it all the property mentioned in paragraph two of the statement of claim and also the goodwill of the said business and the said trade names and that it is thereby entitled to hold the same as against the plaintiffs and it denies that the said bill of sale is null and void as against the plaintiffs or at all and it says that the same is operative and a good and valid bill of sale. (6.) As to paragraph 4 (a) of the statement of claim a good and valid notice of intention to file the said bill of sale was duly lodged in the office of the Registrar-General fourteen clear days before the filing of the said bill of sale. Such notice was not defective for it did set out the true consideration for the said bill of sale. (7.) As to paragraph 4 (b) the said bill of sale itself did truly set out the true consideration for the giving thereof. (8) As to paragraph 4 (c) the defendant denies that the said recital was false and denies that at the time such recital was inserted or at all it knew such recital was false. (9) It denies each and every allegation in paragraph four (4.) (10.) The defendant also claims the said property under and by virtue of an indenture of mortgage registered in the office of the Registrar-General No. 436 book 362 and an instrument of mortgage under the Transfer of Land

Statute registered No. 114848 dated respectively the 22nd day of August 1889 made between the said Sven Adolph Nilsson Wiedemann of the one part and the defendant of the other part. (11.) The defendant also says that the said Sven Adolph Nilsson Wiedemann before his insolvency verbally permitted the defendant to seize the said property and to sell part of the same and to retain the proceeds thereof and the portion unsold as security for his indebtedness to the defendant which the defendant accordingly did and it further says that down to the time of his insolvency the said Sven Adolph Nilsson Wiedemann knowingly acquiesced in all the said acts. (12.) It will object that the said property referred to in the 2nd paragraph of the statement of claim is not personal chattels within the meaning of the Statutes relating to bills of sale. (13.) The said bill of sale was on the 21st day of September 1889 filed in the manner provided by Statutes then in force relating to bills of sale. (14.) The property referred to in the said bill of sale was not nor any of it at or after the time of the sequestration of the estate of the said Sven Adolph Nilsson Wiedemann in his possession or apparent possession.

Reply.—The plaintiffs as to the defence herein say that: (1.) Except as to admissions therein contained they join issue upon such defence. (2.) As to paragraph 10 thereof they say that the provisions of sections 1 and 2 of the Act No. 557 and of section 56 of Act No. 204 have not been complied with either with respect to the said indenture of mortgage or of the said instrument of mortgage in the said paragraph ten mentioned and that the said deeds are therefore null and void and of no validity at law or equity. (3.) As to paragraph eleven thereof they will object that even if the facts therein alleged are true (which the plaintiffs do not admit but deny) that such facts would not do away with the necessity of filing the said bill of sale nor would they entitle the defendants to hold the said goods or the proceeds thereof. (4.) As to paragraph 14 thereof they will object that even if the facts therein alleged are true (which the plaintiffs do not admit but deny) that the said bill of sale would still be void and of no validity either at law or in equity inasmuch as the provisions of sections 1 and 2 of the Act No. 557 have not been complied with.

Rejoinder. The defendant as to the reply says (1.) It joins issue (2.) It will object that Act No. 557 and Act No. 204 do not nor does either of them apply to the said mortgages or either of them, except so far as the said mortgages relate to personal chattels.

George Mackay Pickles was a carriage manufacturer and was the owner of certain premises and of certain stock in trade in connection with the business of carriage manufacturing. Mr. Pickles was heavily indebted to the Australian Financial Agency and Guarantee Company Limited for certain advances made to him by the company. In February 1889 Mr. Pickles negotiated with Mr. Sven Adolph Nilsson Wiedemann as to a partnership, but such partnership was subsequently dissolved by a deed dated the 22nd day of August 1889. On the 17th day of June 1889

the company gave Mr. Pickles notice to pay the principle and interest due to the company from Mr. Pickles under a bill of sale dated the 13th of August 1888, amounting to £31579 4s. 9d. In July 1889 negotiations were carried on between the company and Messrs Pickles and Wiedemann which finally resulted in Mr. Wiedemann being put in possession of the factory premises and stock in trade and in Mr. Pickles obtaining a release from the company of the whole of his indebtedness to the company. In consideration of the above premises Mr. Wiedemann executed on the 23rd of August a bill of sale to the company, and also mortgaged to the company the leasehold premises in Latrobe Street, and also mortgaged to the company his wife's interest in a certain piece of land at Paynesville. On the 25th April, 1890, the company gave Mr. Wiedemann notice to pay the amount due under this bill of sale. This demand was not complied with and Mr. Wiedemann's estate was sequestrated on the 10th March, 1890, and the order nisi was made absolute on the 12th June, 1890. The plaintiff in this action now attacked this bill of sale of the 22nd of August, 1890, from Wiedemann to the company on the various grounds hereinbefore set out in the statement of claim.

Mr. Higgins & Mr. Mitchell appeared for the plaintiff.

Mr. Isaacs and Mr. Fitzgerald (with them Dr. Madden) appeared for the defendant company.

Mr. Higgins opened the facts of the case and then referred to the case of *Vaughan v. Wildon* 12 A.L.T. 17 as a distinct case on the question of the effect of the notice of intention to file not setting out the true considerations for which the bill was given. He also referred the court to *Anderson v. Anthones* 14 V.L.R. 127 and *Kinder v. Sinclair* 8 A.L.T. 163 as to the effect and meaning of a condition attaching to a bill of sale.

Mr. Isaacs at the close of the plaintiff's case moved for a *non-suit*. The consideration is substantially and correctly stated. The guarantee was no part of the consideration. As to the meaning of a condition see *Exp. Popplewell* 21 Ch. D. 73, also *Exp. Collins in re Lees* 10 Ch. App. 367. This latter case is referred to in *Exp. Popplewell* 21 Ch. D. 73. *Anthones v. Anderson* 14 V.L.R. 127 was never intended to be an exhaustive ruling on the meaning of the Act. What we went on in arguing that case was *Ex parte Southam* L.R. 17 E. 578 and *Exp. Southam* must be taken as corrected by *Ex parte Collins*, 10 Ch. App. 367 and *Ex parte Popplewell* 21 Ch. D. 73.

Mr. Higgins in reply. The defence has not dealt with the most material part of the case, viz., the giving of the release to Pickles. According to *Vaughan v. Wildon*, 12 A.L.T. 17, if the headings or sub-headings given in the schedule to the Act are not sufficient new headings must be put in. That case of *ex parte Collins*, 10 Ch. App. 367 was a case in which the consideration was wrongly expressed and under the old bills of sale Act in England there was no provision that the true consideration must be expressed. *Ex parte Southam*, L.R. 17 E. 578 was referred to in

Anthoiness v. Anderson 14 V.L.R. 127. [Hodges, J. The case had better proceed as I shall have to hear evidence on some of these points.]

Mr. Isaacs summing up. The evidence shows that the consideration for which the bill was given is truly stated in the bill as also in the notice of intention to file. The guarantee was no part of the consideration it was a mere collateral agreement *ex parte Winter* 29 W.R. 575. The case of *Vaughan v. Wildon* 12 A.L.T. 17 does not touch this case. An agreement which might or might not be performed is not the same as an actual payment over of money.

Mr. Higgins in reply. The bill of sale was given on the absolute promise to give this guarantee. *Ex parte Charing Cross Co.* 16 Ch. D. 35. *Ex parte Challinor* 16 Ch. D. 260. The case of *ex parte Winter* 29 W. R. 575 if carefully looked at supports the plaintiffs' case. On the question of damages I would refer the court to *In re Yates* 38 Ch. D. 112 and *Climpson v. Coles* 23 Q.B.D. 465.

Mr. Isaacs—The last two cases referred to have no application to this case. They were decided upon the English Bills of Sale Act of 1878 as to what fixtures are capable of complete transfer by delivery and may be included in a bill of sale. See *Brantom v. Griffiths* 2 C.P.D. 212. *Longbottom v. Berry* L.R. 5 Q.B. 123. and other authorities collected in McCaskie on bills of sale, 1882 edition at pp. 18, 19.

Cur ad vult.
Sept. 1.

MR. JUSTICE HODGES.—The plaintiffs are the trustees in insolvency of one Wiedemann, and make a claim in detinue and conversion against the defendant company in respect to certain goods claimed by the defendant company, under a bill of sale given to the defendant company by Wiedemann, and the defendant company is entitled to judgment if that bill of sale is valid. The bill of sale is an honest bill of sale, and I find that there was no intention to deceive; and if the bill of sale is bad, it is because it does not comply with the Acts relating to bills of sale. The plaintiffs contend that the bill of sale is invalid, because the notice of intention to file does not state the true consideration for which the bill of sale was given, and it is also contended that the bill of sale is itself bad for the same reason. In the notice of intention to file under the heading "consideration," sub-heading "past debts taken over by grantor at the time of giving the bill of sale" are these words, "Indebtedness of George Mackay Pickles to the Australian Financial Agency and Guarantee Company, Limited, to the extent of £15,080 taken by grantor at time of giving bill of sale, and under the heading "consideration," sub-heading "future advances" are the words, 'yes if any.' These statements of consideration are said to be inaccurate in the following respects.—First that part of the consideration was a promise by the defendant company to give a guarantee to another bank to secure the advance of £1000 by such bank to Wiedemann, and that there is no reference to this guarantee in the consideration referred to in the notice of intention to file. Secondly, that portion of the £15,080

mentioned in the bill of sale was not a debt of George Mackay Pickles at all. Thirdly, that the consideration for giving the bill of sale was not for taking over a debt of George Mackay Pickles for £15,080, but for taking over his indebtedness to the amount of £16,580. Fourthly, that part of the consideration for giving the bill of sale was a release to George Mackay Pickles, and that this was not referred to in the notice of intention to file. Further that the bill of sale was invalid, because it was given subject to a condition, that if Wiedemann reduced the stock below £9,000 he should pay all the money that he received as the proceeds of such stock to the defendant company. I cannot say that the evidence upon these matters in dispute is very clear, but the conclusion I have arrived at after examining the documents, and hearing and considering the evidence are as follows:—I propose to deal with the objections in their order as I deal with the evidence. In the beginning of 1889, George Mackay Pickles was carrying on business in the name of "G. F. Pickles and Sons, Limited," and was largely indebted to the defendant company to whom most of his property was pledged; he proposed to take Wiedemann into partnership, and the terms were discussed between Pickles, Wiedemann and the defendant company; and some proposal it does not appear what, was made by Wiedemann to and accepted by the defendant company. Before this proposal and acceptance had been embodied in any written agreement executed by the parties, it appeared that there was a certain piece of land in which Wiedemann's wife had an interest, and it appeared that Wiedemann had agreed to mortgage this piece of land to the company. It appeared that this piece of land was not so valuable as Wiedemann had represented it and the company therefore required in addition a bill of sale over the stock. Wiedemann at first objected to give a bill of sale on the ground that it would ruin their credit, and being without money and without credit they could not carry on business. The defendant company, by its directors then asked how much he wanted to carry on with, and Wiedemann suggested £1000 and the directors of the defendant company then said the company would make an advance of £1000. Some discussion then took place between Wiedemann and Pickles as to whether an overdraft from some other bank would not be better for them, and the directors of the defendant company then told them that the company would give them a guarantee to enable them to obtain the advance from some other institution or would itself advance them the £1000. Wiedemann then said "under these circumstances I will sign the bill of sale." The inference I draw from the facts given in evidence is that this guarantee was no part of the bill of sale and was not to be part of its terms, and was not strictly agreed to be put into the bill of sale but that it was something collateral. No doubt it gave Wiedemann another motive for signing the bill of sale and it is very possible that if these terms had not been made by the company the bill of sale would not have been signed, but it was not in my

opinion agreed to as one of the terms of the bill of sale or as part of the consideration for Wiedemann's giving the bill of sale and I am therefore of opinion that the first objection fails. After the negotiations with respect to this guarantee the business was conducted for some time as if Wiedemann and Pickles were in partnership, though no deed of partnership between the parties was ever signed, and though the agreement with the defendant company had not been signed. In June 1889 Wiedemann came to a meeting of the directors of the defendant company and told them that he could not get along with Pickles but that if they liked he would carry on the business himself and this was agreed to. Accordingly in June the company under its securities demanded possession of the stock, and after having obtained it, put Wiedemann in possession of the stock for the company and he so continued in possession till August the 22nd, 1889. And it may be, strictly speaking, that the money expended on the business between those two periods could not legally be treated as money paid to Pickles as has been done in arriving at the amount in the bill of sale. But assuming that to be so, I believe from the documents signed by the company, Wiedemann, and Pickles, at that time and from the correspondence and the conduct of the solicitors and the parties that it was agreed between them that all moneys expended in the business up to the 22nd of August should be treated as Pickles' debt. That he so treated it, that Wiedemann so treated it, and that the company so treated it. I also infer that it was arranged that the stock should be treated as Pickles' stock. I think that the parties agreed to treat everything as being carried on by Pickles up to the 22nd of August, and consequently that the bill of sale treats the whole debt of £15,080 as Pickles' debt because it was agreed to be so treated. I therefore think that the second objection should not be sustained. While Wiedemann was conducting the business on behalf of the company he was endeavoring to have the amount in the bill of sale reduced to as small an amount as possible and was negotiating with the company to reduce it. The company at first insisted on the bill of sale being given for the whole amount of £16,580. Wiedemann argued that it should be reduced at any rate in respect of the amount for which Wiedemann's wife's property was mortgaged to the company. The company at first declined this proposal but finally I believe that it was agreed that credit should be given for £1,500 and a bill of sale taken to secure the balance, and if that be so the plaintiffs have not sustained their third objection to the bill of sale. The next contention argued was that the notice of intention to file should have referred to the release which was to be given to Pickles and that it should refer to it as part of the consideration for the bill of sale. In my opinion the notice of intention to file sufficiently shows that Pickles was discharged or was to be discharged from a liability amounting to £15,080 and it shows that this debt was to be taken over by Wiedemann with the consent of the company. The company were

to take Wiedemann in place of Pickles and that I think sufficiently shows what the real agreement between the parties was, and I do not think that as between Wiedemann and the company the document releasing Pickles was part of the consideration which the company gave to him for the bill of sale in my opinion therefore that objection fails. The next matter discussed is the objection that there was an alleged agreement between Wiedemann and the defendant company to reduce the stock below £9,000. Wiedemann promising to give or to pay to the defendant company all moneys he received for the sale of any stock which reduced it below that value. I think the version given as to that by Wiedemann's solicitor is the one that I ought to take. It is borne out by the evidence and is the most probable, and, though there is some evidence in the defendant's company's books at variance with that version, it is, in my opinion, the result which was arrived at by the solicitor and by Wiedemann in completing the transaction, and I believe that view was that this was not to be part of the bill of sale, my view after hearing the evidence is that it was not an agreement at all; it was merely an intimation that the company could not have any possible objection to the reduction of the stock below a certain amount if the money was paid to them. And it was pointed out at the time that there was no need to have any agreement of such a kind because companies never do refuse to receive money, and the company would not refuse to allow him to sell the stock below £9,000 provided the proceeds were paid to it and according to the solicitors version, he told Wiedemann when the documents were signed, to be careful if he was reducing the stock to get the company's permission to do so, and not to sell until after he had got such permission, so that objection also fails, and in my opinion, therefore, the bill of sale is valid and judgment will be entered for the defendants. I have not referred to individual witnesses with the exception of the solicitor of Wiedemann. I may say that while I do not distrust the honesty of the managing director of the defendant company he seems to me not to be able to understand the difference between facts and the inferences to be drawn from facts and to be unable to understand the difference between the agreement to be inferred from words and the words from which the agreement is to be inferred. And so I find myself unable to rely on most of Mr. Bradley's evidence. I should also say in dealing with the costs of this action that it seems to me that he is largely responsible for the present state of difficulty and confusion. His answers to interrogatories, though they may have been honest, I do not say whether they are or not, have to a great extent induced the present state of affairs and the present difficulty, and would undoubtedly lead any one in the plaintiff's position to take the steps that the plaintiffs' have done with respect to this action, and that being so defendant is not entitled to his costs. I shall therefore order judgment to be entered up for the defendant without costs.

Solicitor for the plaintiff, *W. H. Lewis*; solicitors

for the defendant, *Godfrey and Bullen*.

(Before Webb, J.)

HARRIS V. GOLLINGS.

Sept. 10th.

Vendor and purchaser specific performance—Land Act s. 65.

A purchaser of land sold at an auction, where the title to the land is described as being under sec. 65 of the Land Act, cannot resist specific performance of the contract of sale on the ground that he has been misled by the description of the title.

A vendor may be allowed to make title even after decree.

A condition attached to the license under sec. 65 of the Land Act that the licensee shall enclose the land with a good and substantial fence does not mean that if there is already a good and substantial fence upon the land when the licensee goes into possession that he shall pull it down and erect another.

Licenses granted under sec. 65 of the Land Act are licenses from year to year, and though it is the practice of the department to grant renewals of such licenses, each so called renewal is really a new license so that a breach of the conditions of the license prior to the granting of the last so called renewal would not render the existing license liable to forfeiture.

Where there is a condition in the contract of sale that all objections to and requisitions on title shall be made by the purchaser within a time certain, but the vendor is willing to go on negotiating about the title after the expiry of such time such condition is deemed to be waived.

A vendor contracted to sell to a purchaser 48 acres of land, 26 acres of which was held under two licenses granted under sec. 65 of the Land Act. Held that such contract was illegal and could not be enforced in that sec. 65 of the Land Act only allows a licensee to hold 20 acres of land under a license granted under that section.

Held also that the inability of the vendor to convey more than 20 acres was not a deficiency but a defect, and could not be compensated for either under the compensation clause in the contract or under the general law.

Held also that even if it were a deficiency, the quantity was too large for compensation.

This was an action by a plaintiff seeking to enforce the specific performance of a contract for the sale of land. The defendant resisted the specific performance and counter-claimed for a rescission of the contract and a return of £192 purchase money already paid. In March 1890 the plaintiff was the registered proprietor of about 15 acres of land situate near Rutherglen. He also was in treaty with and had the promise of the government for the fee simple of 7 acres of land adjoining the first mentioned land. He also held a licence from the government under the 65th section of the *Land Act* 1884 for 20 acres of land. At

thesame time one Jacob Branna dummy for the plaintiff held a licence from the government under the 65th section of the *Land Act* 1884 for 5 acres of land, and there was an agreement between the plaintiff and Brann that the plaintiff might do what he chose with this last mentioned 5 acres. The plaintiff being in this position directed John Strickland, auctioneer, to advertise for sale by auction about 50 acres of land which was accordingly done and the following advertisement appeared in the local papers:—"Wednesday April 9th John Strickland has received instructions from C. Harris Esq., to sell immediately after the sale of Mr. Short's land on the 9th April, 50 acres of land (more or less) all cleared, situated on the Browns Plains Road, about half-a-mile from the Rutherglen Railway Station. This land is admirably adapted for growing vines fruit trees &c., John Strickland, auctioneer." In pursuance of this advertisement, John Strickland on the 9th of April offered the land for sale, but before selling he stated in effect (*inter alia*) that the property about to be sold consisted of about 48 acres of land, that the whole of the land had been thoroughly cleared and grubbed, that a portion of the land had been under cultivation, and that the title to the land was as to 22 acres thereof a crown grant and as to the remaining 26 acres that it was held under section 65 of the *Land Act*. The land was then put up for sale in one lot at so much per acre and the defendant became purchaser thereof at £12 per acre making a total of £576. The defendant thereupon signed the contract of sale and paid £192 deposit in pursuance thereof the balance to be covered by bills at one two and three years. From this time viz., April 1890 up till February 1891 there was a good deal of correspondence between the respective advisers of the parties, the plaintiff pressing for a completion of the contract and the defendant objecting to go on with it until he received proof that the plaintiff was in a position to give a proper and valid conveyance of the land. On the 17th of February the writ in the present proceedings was issued and in his statement of claim delivered on the 7th of April 1891 the plaintiff asked for a declaration that the contract should be specifically performed and that the defendant be ordered to make or give bills for the remainder of the purchase money in favour of the plaintiff or in the alternative £1000 damages for breach of the said contract. The defendant by his defence stated that in consequence of seeing the above advertisement he attended the sale, that before taking bids the auctioneer had read out the description of the land and had there stated that the title to the land was as to 22 acres a Crown grant and as to the remaining 26 acres that it was held under section 65 of the *Land Act* and that save as aforesaid no other information was afforded to the title under which the plaintiff held the land. The whole of the land was offered in one lot and bidding commenced at per acre and the defendant in the honest belief that the said 26 acres was held under those sections of the *Land Act* under which the reater part of the agricultural lands of the colon }

have been selected and which enable the holder thereof by complying with certain terms and conditions to become the owner in fee simple became the purchaser of the whole lot at the price of £12 per acre. That the said belief on the part of the defendant was induced or contributed to by the terms of the said advertisement and by the inadequate and incomplete description given at the sale by the auctioneer. That subsequent to the sale the defendant on or about the 12th of April, 1890, discovered for the first time that the only title which the plaintiff could hold under section 65 of the Land Act was a license to use auriferous land and that by the said section the Governor-in-Council was empowered to grant such licenses of certain lands for any period not exceeding one year and not exceeding in extent 20 acres to any one and the same person. That upon discovering the above facts the defendant refused to go on with the contract. That as to the said 26 acres a license for one year under the said section 65 was issued to the plaintiff on the 1st of May 1889 for 19 acres 3 roods and 35 perches and a similar license for the remainder was issued on the 1st of September, 1889 to one Jacob Brann. That both licenses were subject to the following conditions.

Condition 2. "The licensee will not be permitted to assign or sublet the land or any part thereof or of his interest therein without the consent of the Minister of the Crown for the time being administering Part 1, Division 4 of the Land Act, 1890 first had and obtained.

Condition 3—"The licensee is required to reside on the land during the continuance of this license or within a period of four months from the date hereof to enclose the same with a good and substantial fence and cultivate at least one fifth portion thereof."

Condition 6—"The license may be forfeited if the licensee commit a breach of or neglect to comply with any of these conditions."

The plaintiff did not nor did the said Jacob Brann first obtain the consent of the Minister before assigning the said licenses as required by condition 2 above set out. The plaintiff and the said Jacob Brann have not complied with condition 3 above set out. That as to the said 26 acres or any part thereof the plaintiff did not have any power to convey the same or any part thereof or to compel the conveyance thereof to the defendant. And the defendant will contend that in the circumstances above set out specific performance of the contract should not be enforced on the ground that the defendant when he purchased was astray under a mistake induced or contributed to by the plaintiff or his agent. The defendant will also contend that he is entitled to be relieved from the performance of the contract on the ground that in consequence of the plaintiff's breach of the second condition of the licence above set out he cannot give a good title to the said 19 acres 3 roods and 35 perches comprised in the licence issued to the plaintiff. The defendant will also contend that he is entitled to be relieved from the performance of the contract on the ground that in consequence of the plaintiff's breach of the 3rd condition of the licence to the plaintiff, the licence is liable to forfeiture and is therefore not such a title as the court should compel a purchaser to take. The defendant will also contend that specific perform-

ance of the contract should not be enforced on the ground that the said contract is illegal inasmuch as the plaintiff has agreed by the said contract that he will upon the payment of the purchase money execute a conveyance to the defendant of the said 26 acres whereas the plaintiff cannot by law hold or convey a greater area of land than 20 acres nor can the defendant take a conveyance of the 26 acres. The defendant will also contend that specific performance of the said contract should not be enforced on the ground that as to the land comprised in the licence to Jacob Brann the plaintiff cannot in consequence of the breach of the conditions committed by the said Jacob Brann give a good title to the defendant or such a title as the court would compel a purchaser to take. And the defendant counter-claims rescission of his contract and re-payment of the sum of £192 together with interest thereon at the rate of 8 per cent. The plaintiff in his reply stated that he was always ready and willing and able to obtain the minister's consent but the defendant before the time arrived for transferring or assigning the said licence repudiated the contract, and the plaintiff will contend that the obtaining the minister's consent to an assignment is a matter of conveyance not of title. The allegations in the defendant's defence do not disclose such a mistake as should enable him to evade specific performance. One of the conditions of the said contract was that all objections to or requisitions on the title should be made in writing within 21 days from the day of sale, and all objections or requisitions not so made within the time aforesaid should be considered as absolutely waived by the purchaser and the plaintiff will contend that the defendant has waived the objections to the plaintiff's title which are mentioned in the defence inasmuch as the same were not made within the time so prescribed. And the plaintiff will contend that if it appears that he cannot convey to the defendant more than 20 acres of the said land held under section 65 of the Land Act 1884, his inability to take a conveyance of the remainder of the said land affords no valid answer to the plaintiff's claim but is a proper subject for compensation or abatement.

The defendant, by his rejoinder, stated that the plaintiff did not deliver any abstract of title or afford the defendant any opportunity to inspect title within 21 days from the day of sale, and the defendant will contend that the condition as to making any objections to or requisitions on title within 21 days was thereby waived by the plaintiff.

Mr. Irvine, for the plaintiff, opened the case.

Mr. Leon for the defendant.—The description of the title is misleading, sufficiently misleading to entitle the defendant to resist the contract. A vendor must give such a description of his title as will give intending purchasers an indication of what his title is. Then the plaintiff had no title and could not make a title and his licence was liable to be forfeited, the conditions not having been fulfilled. (*Bellamy v. Debenham*, 1 Ch. 1891 p. 412. [*Webb, J.*—There is a case, *South Melbourne & Albert Park Land Co. v.*

Peel (see *Argus* March 14 1890, a decision of the Full Court and confirmed by the Privy Council, *Argus* cablegrams July 31st 1891) diametrically opposed to the case referred to.] Then the reply states that the requisitions on title should have been made within 21 days from the sale. The answer to that is the documents of title were not offered for inspection until after that date.

Mr. Irvine in reply.—The description of the title was correct and quite sufficient, and if the defendant wished to know any more about it he should have enquired. There is no provision in the Act for granting renewals of these licences, each licence is a new licence, and because the licence over this land was liable to forfeiture years ago, the present licence is not so liable. If plaintiff cannot convey more than 20 acres of this land that limit being fixed by the Land Act, he can compel the defendant to take that amount and give a rebate of the purchase money for the part he cannot convey.

Mr. Justice Webb.—This is an action for specific performance by a vendor against a purchaser. The subject matter of the contract is 22 acres of freehold land, and 26 acres held under section 65 of the *Land Act* 1884. On the face of it the contract is perfectly good and regular; but the defences which are raised to this action are various and involve some difficult points. In the first place the defendant says that he entered into this contract through a mistake, and that he bought land held under one kind of licence, believing it to be held under quite a different kind now the advertisement of sale is as follows:—"John Strickland has received instructions from C. Harris, Esq., to sell immediately after the sale of Mr. Sturt's land on the 9th April 50 acres of land (more or less) all cleared situated on the Browns Plains-road about half a mile from the Rutherglen railway station. This land is admirably adapted for growing vines, fruit trees, etc., John Strickland, auctioneer." This does not say what is the nature of the title to the land, it does not say anything about it, but at the auction sale before proceeding to sell the auctioneer read out a memorandum which he had written for that purpose which, after containing some statements as to the value of the land set out *inter alia* that the property about to be sold consisted of about forty-eight acres of land situate on the Browns Plains-road, that the whole of the said land had been thoroughly cleared and grubbed, that a portion of the said land had been under cultivation, and that the title to the said land was as to twenty-two acres thereof, a Crown Grant, and as to the remaining twenty-six acres that it was held under section 65 of the *Land Act*. Now, the only objection taken to that is not that this statement of the value of the land is not perfectly true but it is said that stating that 26 acres of the land are held under section 65 of the said Act gave no information to the defendant of what he was buying and that he thought the tenure given by section 65 was something different." If a man goes into an auction room and bids for land which is then being sold under a perfectly correct description, and the land is knocked down to

him it is not open to him to afterwards say "Oh! I thought that the land was held under a title quite different. I think this information is sufficient and accurate. And if a person present at the sale wished to know anything more about the land he should have asked and he cannot now say that he was misled. I am against the defendant altogether on this point. The defendant's next defence is that the plaintiff had no title and could not get a title, this being a licence only, and that the licence was subject to forfeiture at the time of the sale. Now a licence may be given a title to and if there is no restriction against the assignment of the licence the licensee had a very good title. The plaintiff held a licence as to 20 acres of the land, granted to himself, as to the remaining six acres the licence was in another person, but that person had authorised the plaintiff to sell so that the plaintiff possessed control over that portion of the land as well. It has been argued that a vendor must have an absolute title at the time of the sale and that if he sell when his title is incomplete the contract will not be enforceable. Now that is a principle I have never heard contended for before; under the old rule it was sufficient even if the vendor showed title in the office after decree. A case has been cited in argument by the counsel for the defendant *Bellamy v. Debenham* 1 Ch., 1891 p. 412 which says that where a vendor has not power to convey nor power to compel a conveyance from any other person, the purchaser is entitled, upon discovering this, to rescind the contract though the time allowed for completion has not expired and specific performance cannot be decreed. But here the plaintiff had power to convey so that meets that case. That case however is entirely inconsistent with *The South Melbourne Land Co. v. Peel*, reported in the *Argus* of March 14th 1890, in which time was given to the vendor to buy up the title and that case has been affirmed by the Privy Council (See cablegram *Argus* July 31st 1891) on appeal by which I am conclusively bound, so that that objection cannot prevail. Then it is said that the licence which was sold was voidable at the time of the sale and it is argued that where a lease or a licence is voidable at the time the contract is entered into the contract is not enforceable. Now the licence was originally granted on the 1st of May 1888 and it is made subject to the terms and conditions specified in the back. One of such conditions is that:

The licensee is required to reside on the land during the continuance of his licence or within a period of 4 months from the date hereof to enclose the same with a good and substantial fence and cultivate at least one-fifth portion thereof.

It appears that this land was cultivated but it is said that the plaintiff did not within four months from the date of the license enclose it with a good and substantial fence. By interrogatories administered by the defendant to the plaintiff as to the licence for the 20 acres in the name of the plaintiff and as to the licence for 6 acres in the name of Mr. Brann, the 8th interrogatory is as follows:—

"Had you or had the said Jacob Brann within 4 months from the respective dates of the issue of the said licences to you and to the said Jacob Brann enclosed the respective

pieces of land held by you and the said Jacob Brann under the said licence with a good and substantial fence."

And the answer was that he had not enclosed it but he tells us in the witness box to-day that he did not so enclose it because it had a good and substantial fence at the time he went into possession and it would be absurd to say that the meaning of that condition was that if there was a good and substantial fence there when a person bought he must pull it down and erect another. That is one answer to this objection. Another answer is that this is an annual licence expiring on the 1st of May 1889. Renewals from year to year have been granted since but each renewal can only be held to operate as a new licence. There is no power to give renewals under the Act. Section 65 gives the Governor-in-Council power to grant licences for any period not exceeding one year so that strictly the course would be to grant a new licence every year, but the practice adopted has been not to issue a new paper each year but to gazette a renewal for such time, which must be taken to be *pro tanto*. Therefor the only question is whether this so called renewed licence was at the date of the contract voidable or not. The defendant relies on the condition on the back, but there is no evidence on the subject and it does not appear that a good and substantial fence was not erected within four months from the date of the renewal which is another answer. These objections by the defendant are sought to be answered by the plaintiff by reference to a clause in the contract that all objections or requisitions on the title should be made in writing within twenty-one days from the day of the sale and all objections or requisitions not so made within the time aforesaid should be considered as absolutely waived by the purchaser. In the view I take, it is immaterial whether that is a good answer or not. In my opinion it is not a good answer in the present case because months after the expiry of the 21 days the vendor's solicitor on the 29th of December 1890 wrote to the plaintiff's solicitor that the title to the property could be seen in Melbourne at any time and place appointed for the purpose which is a distinct waiver of the conditions that objection must be taken within 21 days. He was willing to go on negotiating about the title long after the time appointed for lodging objection and it has been held that under such circumstances the condition is deemed to be waived, so that on all these grounds I am against the defendant. Then it is said by the defendant that an assignment of a licence for more than 20 acres is illegal, and that here 26 acres are contracted to be sold. Now for that we must look at section 65 of the *Land Act* which provides that

"The Governor in Council may from time to time grant licences for any period not exceeding one year which shall entitle the holders thereof respectively to reside on or to cultivate any lands comprised within the areas described within the Second Schedule hereto as auriferous lands not comprised within any city or town and not exceeding in extent 20 acres subject to the payment of such licence fee and upon such terms and conditions as are approved of by the Governor in Council and set forth in such licence. Provided that not more than one such licence shall be granted to or held by any one and the same person."

Now here the plaintiff entered into a contract to sell 26 acres which could not be held under one licence and it turns out that on the facts that it was held under two licences one for twenty acres in the name of the plaintiff and one for 6 acres in the name of Jacob Brann. The plaintiff admits now that he cannot compel the purchaser to take more than twenty acres in more than this one licence but he says that he can compel him to take the 20 acres and compensate him for the deficiency either under the compensation clause in the contract or under the general law. That clause in the contract is as follows :

"If any mistake or error be made in the description of the property, such mistake or error shall not annul the sale, but a compensation shall be given or taken to be settled by arbitration in the usual manner."

Now this is not a mistake or error in the description of the land so that that clause does not apply. And as to its being a deficiency for which compensation can be given under the general law there is no deficiency in the land but the plaintiff is prevented by the Act of Parliament from conveying this land. This is not a case of deficiency; it is a defect. He has entered into a contract which he cannot perform. And even if it were a deficiency I should say that it was much too large in quantity. A deficiency means for example a case when a person contracts to sell 200 acres and can only give title to 199½ or 199 acres, but does not refer to a case like this where the deficit amounts to 6 acres out of 26 but I hold that this is not a deficiency. Here this land was all there, but the conveyance of it would be illegal and void. There has been great delay in the case on the part of the defendant. He never set up any of these defences but went on asking for the production of the title and he thereby induced the plaintiff to think that he intended to complete and he never brought forward these objections which I suppose were only discovered when the parties began to litigate. Another reason why I shall give no costs is that both the plaintiff and the defendant must have been aware that they were committing a breach of the *Land Act*. There will be judgment for the defendant on the claim without costs and judgment for the defendant on the counterclaim for the rescission of the contract without costs.

N.B. Judgment was not given for the defendant for the return of the purchase money already paid as asked for in the counterclaim because it appeared that the money was still in the hands of the auctioneer and had never come into the hands of the plaintiff.

Solicitors for the plaintiff.—*Casey and O'Halloran*.
Solicitor for the defendant.—*Miles*.

IN CHAMBERS.

(Before a'Beckett, J.)

McVITTY AND ANOR. v. CROWLEY AND ANOR.

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20th October.

Rules of Supreme Court 1884, Order LVII. r. 7—

Order LXV. r. 27 (41)—Interpleader issue—Costs—Review of taxation—Where an order directing an interpleader issue provides that the costs of both the plaintiffs and the defendants in the issue should abide the event—Held, that the costs of the proceedings should go as in an action between the parties.

Application on behalf of the defendants for an order to review the taxation of the defendants' costs. It appeared that 6 horses in the possession of one Bacchus were claimed by both the plaintiffs and the defendants to the issue. Bacchus interpleaded and an order was made directing the trial of an issue as to whose property the horses were and also directing that the costs of the applicant of the interpleader application should be paid by the plaintiffs in the issue and be costs of the plaintiffs in the cause, and it was also ordered that the costs of both plaintiffs and defendants of the application and of the issue should abide the event.

At the trial of the issue judgment was entered for the plaintiffs as to 5 of the horses; and for the defendants as to the remaining horse. On the taxation the taxing officer allowed the plaintiffs the general costs of the issue and allowed the defendants the costs of proving their right to the one horse.

The taxing officer's reasons were as follows:—

I disallowed the costs referred to because in my opinion the plaintiffs had substantially succeeded in the action and were therefore entitled to the general costs in the cause. *Fazakerly v. Rogerson* 1 L.M. and P. 747.) The order dated 20th February, 1891, it will be seen, speaks of the costs of this cause and therefore in my judgment precludes the application of the principle laid down in the case of *Clifton v. Davis* 6 E. and B. 392; 25 L.J. Q.B. 344 viz that no general costs of the cause in an interpleader issue in which each party is substantially successful should be allowed, and that the costs should be taxed without reference to the fact as to which was plaintiff and which defendant, see also *Staley v. Pedwell* 10 A. and E. 145. The defendants having obtained a verdict as to a small part only of the cause of action were I considered entitled to the costs of defending the action so far as it related to that part of the issue upon which they were successful and I allowed accordingly for portions of affidavits, briefs, instructions for brief &c., also for parts of fees paid to counsel and for attendance and subpoenas of the witnesses whose evidence applied to the part of the issue referred to.

To this mode of taxation the defendants objected. *Mr. Barrett* in support. In an interpleader issue there are no general costs. There are no costs in the cause as costs in the cause where each party is successful as to part. *Clifton v. Davis* 6 E. and B. 392, *Lewis v. Holding* 2 M. and G. 875. *Gordon* on costs p. 246.

Dr. Madden to oppose was not called upon.

HIS HONOR said:—This was a question affecting the apportionment of costs under an order. They are costs arising out of interpleader proceedings and in the absence of an order it appears that there is a special construction applied to interpleader costs and it is suggested that these principles should be resorted to. The guide to the taxing officer is to be the order, which in the exercise of his discretion the judge made and intended to make. The order directs that the question to be tried should be whether on a certain date six horses were the property of the plaintiffs in the issue, as against the defendants, and that the costs of the party interpleading be paid by the plaintiffs, and be

costs of the plaintiffs in the cause, and that the costs of the application and of the issue should abide the event. What I understand to be the proper interpretation of that order, is that this made an issue in which the persons who claimed the horses under the execution are placed in the position of plaintiffs, and the other parties to the issue are placed in the position of defendants, and that the costs would go as in an action tried between these parties. That seems to me to be a perfectly intelligible mode of dealing with the costs. It is said that inasmuch as this is not an action some other rule as to costs should be applied. But the reason for adopting the interpretation I place upon the order is that, without such an interpretation, the taxing officer would have nothing whatever to guide him in dealing with these costs. I do not dispute the principles referred to in the cases cited, where the order makes no provision for the costs. I think this order does provide for the way in which the costs are to go, and that that distinguishes this case from the authorities cited. I dismiss the summons with £3 3s. costs, and I certify for counsel.

Solicitors for plaintiffs, *C. M. Watson*; for defendants, *H. S. Barrett*.

SITTINGS IN BANCO.

(Before *Higinbotham C.J.*, *A'Beckett* and *Hood J.J.*)

BLASHKI v. SMITH.

14th, 20th Oct.

Libel—Words necessary libellous—Functions of judge and jury.

If words written or printed are not in their natural sense libellous, and the plaintiff fails to show by extrinsic proof that they were used in a libellous sense, it is the duty of the judge to withdraw the case from the jury; if such words necessarily bear a libellous meaning, it is the duty of the jury to find that they are libellous, and the Court will set aside a contrary finding; if such words are of doubtful import and may or may not bear a libellous meaning, it is for the jury to determine whether they are libellous or not. Per A'Beckett J.—The Court will not set aside the finding of the jury that certain words do not import a libel unless there is no escape from a libellous interpretation.

Cur : adv : vult.

Motion for a new trial.

The plaintiff had sued the defendant for an alleged libel contained in a letter written by the defendant and published in the *Australasian Keystone* a journal of the Masonic body on Feb. 1. 1890. The letter, so far as set out in the statement of claim, was as follows:—"Now, Mr. Editor, to show you and the brethren that Brother Blashki's statements was 'bunkum and that he did not believe it to be true' he actually went to the asylum and handed £2 10s

"to the superintendent for distribution amongst the old Masons, although he stated that only one of them had a certificate. I recognise the fact that so long as the money did not go through the hands of a Britisher, but was handed over by President Blashki as having been procured by him it must of necessity have been well spent and in his honor, I asked for £2 2s, which he characterised as a dreadful waste of funds. I suggested that amount quarterly, and stated so, but in the face of the original letter the president (the plaintiff) and the chaplain repeated twice over that I asked definitely for £30 per annum to spend as I wished. Certainly a new way of spoiling the Egyptian—by misrepresentation and reckless statements. I will if he (the plaintiff) wishes at any time and for any sum to be given to charity, contrast my Masonic career with his. See how the Kent Lodge fared; see circulars as to supplying goods etc.; follow up the alms house episode, and let him produce his cash books, and I will mine, to show who makes a living by the profession of Masonry."

At the trial of the action the learned judge, Hodges J., defined to the jury what a libel was and left it to the jury to say whether the defendant's letter was or was not a libel. The jury found that it was not a libel. The plaintiff made the application, now being reported, substantially on the ground that the jury were bound to find that the letter was libellous.

Mr. Isaacs (with him *Mr. Mitchell*) in support; The words contained in the letter are necessarily libellous; *Odgers* (2nd ed., 318, 320; the jury should consequently, have answered the question of libel or no libel in the affirmative, *Stephen v. Michie Argus* 8th April 1858.

Mr. Bryant (with him *Dr. Madden*) contended that the words were not libellous, or, at least, were of such doubtful import as to make their interpretation solely a question for the jury; he referred to *Capital and Counties Bank v. Henty* 7 App. Cas. 741.

Mr. Isaacs in reply.

HIGINBOTHAM, C.J., (delivering his own and Mr. Justice Hood's judgment)—Motion for new trial. The plaintiff sued the defendant for an alleged libel contained in a letter written by the defendant, and published in the *Australasian Keystones*, a journal of the Masonic body, on February 1, 1890. The learned judge defined to the jury what a libel was, and left it to the jury to say whether the defendant's letter was or was not a libel. The jury found that it was not a libel. The plaintiff claims by this motion that the verdict should be set aside and a new trial had between the parties on the ground, in substance, that the jury were bound to find that the letter was libellous. The practice on this subject is now well settled. If words written or printed are of doubtful import, and may or may not bear a libellous meaning, it is for the jury to determine whether they are libellous or not, and the Court will not set aside their finding. (*Fermaner v. Summerton*, 5 A.J.R., 146; *Geach v. Hall*, 16, V.L.R., 386.) If words written or printed are not in

their natural sense libellous, and the plaintiff fails to show by extrinsic proof that they were used in a libellous sense, it is the duty of the judge to withdraw the case from the jury. (*Capital and Counties Bank v. Henty*, 7 App. Cas., 741; *Warton v. Gearing*, 1 V.L.R. L., 122.) But if such words necessarily bear a libellous meaning, it is the duty of the jury to find that they are libellous, and the Court will set aside a contrary finding. (*Stephen v. Michie*, *The Argus*, April 8, 1858; *Rocke, Tompsitt, & Co. v. Wilson and another*, 13 V.L.R., 833.) The plaintiff and the defendant were grand-officers of a Masonic lodge. A meeting was held on December 15, 1889, at which a difference of a trifling nature arose about the application of funds to charitable purposes. The defendant alleged in his letter, amongst other things, that the plaintiff had stated at this meeting that certain old Masons in the Benevolent Asylum were well off, and had saved money; that this statement was bunkum, and that the plaintiff did not believe it to be true. The defendant also alleged that the plaintiff, having a letter from the defendant, in which he (the defendant) had applied to the lodge for £2 2s. a quarter to spend in charity, had twice or thrice over made to the meeting the misrepresentation and reckless statement that he (the defendant) had asked definitely for £30 per annum to spend as he wished. The defendant also, in the same letter, impliedly charged the plaintiff with making a living by the profession of Masonry. Having regard to the first two of these statements and the occasion to which they related, we think that they were necessarily libellous, as having a necessary tendency to attract to the plaintiff the hatred or contempt of those with whom he was acting in the management of the funds of the lodge, and to whom, as a grand officer he was under a special obligation to speak nothing but the truth. The charge of joining or continuing to be a member of a Masonic body for the purpose of making a living by it, is one that, if believed, would naturally tend to alienate from the plaintiff, as a member and officer of the body, the goodwill and confidence of the members, and expose him to their ill-will and contempt, and it would therefore be a libel. The apparent paltry character of the dispute between the parties might properly be considered by the jury in dealing with the question of damages, but the jury were not at liberty, in our opinion, to hold that a publication which necessarily imported libellous meanings was not a libel. The motion will be granted with costs. The verdict obtained by the defendant will be set aside, and a new trial granted, the costs of the first trial to abide the event of the second trial.

A'BECKETT, J.—This is a motion to set aside the verdict of a jury who have found that a letter written by the defendant, and published in a Masonic newspaper called the *Keystone*, was not a libel. The learned judge who tried the action correctly defined what constituted a libel, carefully examined and criticised the language complained of, and pointed out to the jury one construction on which the publication might be considered libellous and another on which it might not. The jury deliberated as the judge told

them to do, and found that there was no libel. The plaintiff does not say that there was any misdirection by the judge, but asks us to say that the verdict was against the evidence; that the judge who charged the jury was wasting time in telling them what they had to consider; and that the jury were wasting time in considering it, inasmuch as the law would only allow them to find in one way, and if they found in the other their verdict would be set aside. The functions of judge and jury in an action of this kind are stated as follows in *Odgers on Libel*, second edition, p 95:—

"The proper course is for the judge to define what is a libel in point of law, and to leave it with the jury to say whether the publication in question falls within that definition, and this is a question preeminently for the jury; whichever way they find, the Court will not disturb the verdict if the question was properly left to them."

This statement would not apply to a case in which a charge of theft or of any other infamous act had been found to be no libel, but with this qualification it states the law which this Court has acted upon in refusing to set aside the jury's verdict for the defendant unless the publication complained of is necessarily libellous. If the writing can bear a construction which is not libellous the verdict of the jury is allowed to stand. The letter complained of in this instance was written with reference to a meeting of Freemasons, at which a discussion arose as to the distribution of charitable funds, and complaints as to their extravagant or injudicious application, and at which no peculation or dishonesty had been attributed to anyone. The defendant wrote:—

"With respect to old Masons in the Benevolent Asylum, President Blashki attempted a sensation in stating that they were well off and saved money (where did it come from?), and in the next breath he stated they spent their money in whisky and tobacco. Now, Mr. Editor, to show you and the brethren that Brother Blashki's statement was bunkum, and that he did not believe it to be true, he actually went to the asylum and handed £2 10s. to the superintendent for distribution amongst the old Masons. I asked for £2 2s., which he characterised as a dreadful waste of funds. I suggested that amount quarterly, and stated so; but in the face of the original letter the president and chaplain repeated twice and thrice over that I asked definitely for £30 per annum to spend as I wished—certainly a new way of spoiling an Egyptian by misrepresentation and reckless statements."

As to this part of the alleged libel, the judge, in charging the jury, told them to look at each statement and see whether it amounted to a charge of lying or merely of creating a false impression by glossing over something or keeping something back. He says—

"If it meant a charge of wilful deliberate lying, I think there can be very little doubt that you would say the defendant intended to hold the plaintiff up to hatred, contempt, and obloquy. It is a question for you, gentlemen, I ask your attention to these two views—it is capable of both, and it is for you to say whether it is a libel or no libel."

The jury have done what the judge asked them to do. They have come to the conclusion that the defendant did not charge the plaintiff with lying, and have said that there was no libel. I agree with them; and even if I did not I should refuse to disturb their verdict on a question which, in accord with the judge who asked for their answer, I consider fairly open for them to determine. The next passage in the letter deals with an entirely different subject, and must be given in

extenso :—

"I will, if he wishes, at any time and for any sum to be given to charity, contrast my Masonic career with his. See how the Kent lodge fared. See the circulars as to supplying goods; follow up the almshouse episode, let him produce his cash book and I will mine, to show who makes a living by the profession of Masonry."

As to this the judge read to the jury the innuendo, and said—

"You will say, gentlemen, whether it has any of the meanings assigned. If it has any of those meanings which tend to hold the plaintiff up to hatred, contempt, ridicule, or obloquy, you will then on that question answer for the plaintiff. If you think it has no real effect at all, or no real charge, or in no substantial way touches his reputation, then you will say it is no libel."

I think that the finding of the jury for the defendant on this part of the letter can be sustained. The passage is undoubtedly capable of a libellous construction, but without any unfair straining of its meaning it is capable of a different construction. An absurd challenge is thrown out to contrast Masonic careers, to produce cashbooks, and see who makes a living by the profession of Masonry. It does not directly affirm that either makes a living by it, nor does it say that the living so made is made dishonestly. It does not treat the profession of Masonry as a hypocritical pretence, for by the terms of the challenge both defendant and plaintiff are described as persons who profess, and the defendant would not write himself down a hypocrite. Even if it amounted to a charge that the plaintiff used his position as a Mason to advance his pecuniary interests, by pushing his trade or other means not dishonest, and no dishonesty is imputed, I should say that such a charge was not necessarily libellous. To upset the verdict we should see no escape from a libellous interpretation. The Court has on this principle recently supported the verdict of a jury who found that it was no libel to write of a shire councillor—

"He tidleywinked the shire funds, having work done—that is roads made, before authorised by the said council, to his own door, to the detriment of much older residents; moneys taken from one road and placed on roads nearer to his own place. That is the way he has been doing business. Of course he can't face us on the Tarwin."

(*Geach v. Hall*, 16 Vict. L. Reports.) It appears to me that the construction which supported that verdict was far more difficult to arrive at than the construction required to support the present. I feel that in this case the Court is not compelled by any of the language used in the publication complained of to reject the decision of the jury upon that which they were asked to decide, and that a new trial is as unnecessary as it is undesirable.

Solicitors, for plaintiff, *Gaunson and Wallace*; for defendant, *Crisp and Cameron*.

SUPREME COURT SITTINGS.

(Before Webb, J.)

DISMORR V. GEORGE AND OTHERS.

Sept. 5.

Mortgage, clogging the equity of redemption.

A. leased certain premises to B. for a term of 21 years. B. mortgaged the lease to C., and in the indenture of mortgage was a covenant giving C., the mortgagee, an option to purchase. B. assigned the lease to D., who took the assignment with full knowledge of the mortgage and the covenant therein contained giving the option to purchase. C., the mortgagee, brought an action against D., the assignee of the lease, to enforce specific performance of the covenant. Held that the action was misconceived and would not lie against the assignee of the lease.

A covenant in a mortgage over a lease, giving the mortgagee the option to purchase at a price which shall be the proportionate value of the lease on the day of purchase calculated upon the basis of a fixed sum as the value of the lease on a particular day, prior to such purchase is not void for uncertainty.

A covenant in an indenture of mortgage, giving the mortgagee an option of purchase, cannot be specifically enforced, as it is in direct violation of the rule of law that the equity of redemption cannot be clogged in any way.

This was an action by the plaintiff to enforce specific performance of a covenant giving him an option to purchase certain leasehold premises, and contained in a mortgage given to him over the lease to secure the repayment of moneys lent by plaintiff on the security of the lease. By an indenture, dated the 31st August 1883, James Stewart Dismorr, the father of the plaintiff, leased to William Henry Harrison George and Alfred Harley George certain premises in Collins-street for a term of 21 years. By an indenture, dated the 9th December 1886, Messrs. W. H. George and A. H. George assigned the lease to the plaintiff, by way of mortgage, to secure the advance of £3300, and in such mortgage deed it was provided as follows:—

"And also that the said mortgagors hereby give and grant to the said mortgagee his executors administrators and assigns the option of purchasing the said lease and premises for all the residue and remainder of 21 years granted by the said recited lease for the price or sum of £5000, such option to remain open to the said mortgagee his executors administrators assigns for and during the period of six months from the 1st day of September 1886 namely to the 27th day of February 1887 both days inclusive. Provided always that if the said mortgagee his executors administrators or assigns do not within the said period exercise such option of purchase as aforesaid and complete such purchase then it shall be lawful for the said mortgagors their executors administrators or assigns to sell or offer for sale the said in part recited lease during the period from the 27th of February to the 31st of August 1887 but not at a less price than £5000 until they shall have offered the said lease to the said mortgagee his executors administrators or assigns by letter or notice sent or left for him or them to or at his or their last known place of business or residence in the Colony of Victoria at a price of £4750 and allowed the said mortgagee his executors administrators or assigns one calendar month from the same offer being made to accept the same and complete the purchase within one month from such acceptance and should the said mortgagee his executors administrators or assigns not exercise either of the said option of purchase and complete such purchase as aforesaid during the aforesaid period and if the said lease shall not have been otherwise sold by the mortgagors their executors administrators or assigns by the 31st day of August 1887, then the said mortgagee his executors administrators or assigns shall have the right and option to purchase

the lease subject, however, to the right of the said mortgagors their executors administrators or assigns during such remaining term of these presents to compel the said mortgagee his executors administrators or assigns either to purchase the said lease or to forfeit his right to do so by giving to the said mortgagee his executors administrators or assigns or his or their agent or agents in Melbourne, six months notice in writing (so to do) but in the event of the said mortgagee his executors administrators or assigns exercising the option of purchase as aforesaid, the price to be paid by him or them for the said lease shall be the proportionate value thereof on the date of such purchase by the said mortgagee his executors administrators or assigns calculated from or upon the basis of £5000 as the value of the said lease on the 1st September, 1888."

By an indenture dated the 21st May 1890, Messrs. W. H. H. George and A. H. George assigned to Messrs. A. H. George, John Marshall and James Gordon Haggart the residue of the term of the said lease for the sum of £50. Neither the option to purchase the lease during the period of six months from the 1st of September 1886 nor the power of sale of the said lease given by the indenture of mortgage to the said mortgagors to sell such lease within the period from the 27th February 1887 to the 31st August 1887 was ever exercised nor was any notice given under the indenture of mortgage to determine the plaintiff's right to purchase the lease. On the 29th November, 1890, the plaintiff gave notice to the defendants that he would exercise his option of purchase but the defendants refused to carry out such purchase and the plaintiff claimed specific performance of the covenant in the mortgage giving him an option to purchase and a declaration that the defendants be ordered to assign the lease to him with all proper covenants on payment of the purchase money therefor.

The defence was that the assignment of the lease was made with the previous licence and consent of the lessor and with the plaintiff's knowledge and concurrence. That the covenant in the mortgage giving the plaintiff an option to purchase was contrary to equity inasmuch as the effect of it was to clog the equity of redemption and give a collateral security to the mortgagee in addition to the mortgage, that the covenant in question was void for uncertainty and further that the covenant to sell the lease was not enforceable against the defendants as assigns of the lease.

Mr. Neighbour (Mr. Topp with him) for the plaintiff referred the Court to Fisher on Mortgages Vol. II. p.p. 722, 723.

Mr. Weigall (Mr. Higgins with him) for the defendants referred the Court to Tasker v. Small 3 My. and Craig, 63.

MR. JUSTICE WEBB.—Messrs. William Henry Harrison George and Alfred Harley George were the lessees under a lease dated the 31st of August 1883 of property in Collins-street, for the term of twenty-one years. On the 9th of December 1886 they borrowed £3,300 from the plaintiff giving as security for that sum a mortgage over the lease, which is in the ordinary terms and contains the ordinary covenants and provisoes. At the end of that mortgage was a clause giving the mortgagee the option of purchase. I need not go into details of this clause for the purposes of my judgment as to how that option was to be exercised. On

the 21st of May 1890 the mortgagors assigned the lease to the present defendants omitting William Henry Harrison George, who is not now a defendant, the action having been discontinued against him. This action was brought by the mortgagees against William H. H. George, Alfred Harley George, Marshall and Haggart to enforce his option of purchase. It was afterwards discontinued against William H. H. George and in discontinuing against him the plaintiff treats this action as one against the assignees of the lease only. It is evident that the view which the plaintiff has taken is that the action against the assignees of the lease without making the original mortgagors parties is sufficient. This clause to enforce the plaintiff's option of purchase is met by the defendants on three grounds mainly, though there is a subsidiary question with which I need not deal. First, it is said that the only contract giving the option of purchase is between the plaintiff and the two Georges and that, although, the present defendants were the assignees of the lease from the Georges with knowledge and notice of the existence of the mortgage deed and its provisions, still that option to purchase must be enforced against the parties to the contract, in other words that there is no privity of contract as to the option of purchase between the plaintiff and the present defendants. Under the circumstances of this case, in my opinion, that contention is correct; but I do not by any means wish to be understood to imply that if a lease had been given with an option of purchase in the lease itself that option might not have been exercised by the assignees of the lease against the lessor. Here the lease itself contains no option of purchase, but by an independent document an option is given. Then the assignee of the lease even if he took with notice of the option is not the one primarily bound by it, and the action to enforce the option to purchase would not primarily lie be against him. Therefore, this objection is good. The action in its present form is misconceived. It was right in the first instance, but it is not now in such a form as to entitle the plaintiff to recover. The next objection is that the price is incapable of being fixed and is ambiguous, and therefore, that the contract is void for uncertainty. The provision as to price is "the price to be paid by him or them for the said lease shall be the proportionate value thereof on the date of said purchase by the said mortgagee his executors administrators or assigns calculated from or upon the basis of £5000 as to the value of the said lease on the 1st September 1886." In my opinion, upon the principle of the maxim *id certum est quod certum reddi potest* that is a perfectly valid clause. The intention, as the reference to the date shows, was that as the lease became of less duration and less valuable from an actuarial point of view so the price should diminish. It is a mere sum of proportion—if a lease with 20 years to run is worth £5000 how much is the same lease worth with only one year to run. That objection, I think, cannot be sustained. Following upon that objection is another that the price ought to have been fixed before this action was brought, and that

the plaintiff ought to have tendered the price so fixed. That objection is not raised in any way by the pleadings and I decline to entertain it. Another objection and the most material and substantial one is that this contract giving an option of purchase is void as clogging the equity of redemption and opposed to the principle "once a mortgage always a mortgage." There is no doubt that a mortgage transaction must be a mortgage pure and simple and that you cannot clog it with any other dealing or transaction. You cannot stipulate that you shall have a bonus and the Court will not allow in a mortgage any contract that the mortgaged property shall become the property of the mortgagee in any event whatever. That was decided as long ago as 1745 in a case reported in 3 Atkins 261 and that has continued to be the law as laid down by Courts of Equity from that day to this. This contract in this mortgage directly violates that law. It does contain a provision that the mortgaged property shall become the property of the mortgagee in some events and therefore contravenes the above rule of law. Therefore this objection is a perfectly good one. The answer attempted to be given to it is that the mortgagee may deal with the mortgagor for the purchase of the equity of redemption, and it is said that if he may so deal the day after the mortgage is entered into he may so deal on the day and at the time the mortgage is given and that the dealing may be put into the instrument of mortgage. In my opinion he may not so deal as an element for the consideration in the mortgage. If there is a perfectly valid mortgage and a contract is afterwards entered into for the sale of the mortgaged property the mortgage relation is terminated and the parties become vendor and purchaser instead of mortgagor and mortgagee. But if it is part of the original mortgage transaction the parties continue at the same time in the relation of mortgagor and mortgagee and in the quasi relation of vendor and purchaser and that is what the law does not permit. As to the question whether the notice given to Messrs. George and George is good I think it unnecessary to deal with that. Judgment will be for the defendant with costs.

Solicitors for plaintiff *Wise would Gibbs & Wise would*,
solicitors for defendants *Braham & Pirani*.

Before Webb J.

MOORE V. WHEAL BYJERKEENO TIN MINING CO. NO
LIABILITY.

Sept. 8th.

Sale of forfeited shares—Companies Act 1890 s.s.
The advertisement advertising the time when the call on shares in a company will be payable must be published a reasonable time before the call is payable and a call which has only to be advertised in Melbourne and is payable in Melbourne is reasonably advertised if seven days notice is given.

Every share in a company is liable to pay calls and if shares lying in the hands of a company are after a call has been made but before it has become payable sold to a purchaser such purchaser is liable for the call when it becomes due.

There is no provision in the Companies Act which prevents directors of a company after an abortive sale of forfeited shares from ordering and holding a fresh sale.

The plaintiff in this action was originally a holder of shares in the defendant company, which were forfeited and sold for non-payment of calls, and this action was to set aside the forfeiture and sale and in the alternative sought the redemption of the shares. Prior to the 19th of June 1890 a number of shares in the defendant company had been forfeited for non-payment of the first call, and on the 28th of June, 1890, these shares were sold and the plaintiff purchased 15000 of them. On the 19th of June prior to the purchase of the shares by the plaintiff the company made a second call which became due and payable on the 9th July. On the 2nd of July a notice of this second call payable on the 9th of July was published in the *Argus* newspaper and in the *Government Gazette* on the 4th July. The plaintiff did not pay this second call and accordingly 14 days after the 9th July the shares became forfeited. These shares of the plaintiff were then advertised in the *Argus* on the 8th August and in the *Age* on the 15th August for sale on the 26th August. This sale was postponed by the manager of the company till the 6th September, but the shares were not sold on that day either. Then on the 16th October the shares were again advertised for sale on the 25th October and on that day the plaintiffs and a number of other shares were put up for sale and purchased for the company by the directors and the plaintiff now sought to recover back these shares.

Mr. Cussen for the plaintiff: The call was invalid in that it was not duly advertised or even if the call was good the shares could not be forfeited for non-payment of it because it was not duly advertised. The notice should be given a reasonable time before the call is payable, and this is not a reasonable notice. It is also submitted that these shares were not liable to this call. At the time the call was made the shares were in the hands of the company, and shares in the hands of a company are not liable to calls, being of the plaintiff is not liable for anything that has been done prior to his purchase, he was entitled to have the shares free from any liability. Further, the sale, when it did take place, was abortive. The directors had no power to make a sale after the postponement of the prior advertised sale by the manager had lapsed, See section 7 of Act No. 742 and ss. 55, 56, and 118. sub-sec. 5 of the *Mining Companies Act 1871*.

Mr. Weigall (*Mr. Topp* with him) for the defendant. —At the time the call was payable the plaintiff was the owner of the shares, therefore he is liable. Though the Act limits the power of the manager, as to postponing sales of forfeited shares, it does not in any way limit the power of the company to dispose of forfeited

shares. *King's Birthday Coy. v. Jack*, 11 V.L.R. 197, confirmed by *Haddow v. Duke Co.*, 13 A.L.T. 4.

MR. JUSTICE WEBB.—This is an action by a former shareholder in the defendant company seeking to set aside a forfeiture and sale of shares, and to be reinstated as a member of the company, and in the alternative seeking to redeem these shares. The shares were purchased by the plaintiff when they were sold by the directors as forfeited shares for the non-payment of the first call. Before the plaintiff purchased the shares a second call had been made; that call was payable on the 9th of July, which was after the plaintiff had purchased, he having purchased on the 28th of June, and having been registered on the 30th June. The call due on the 9th of July was not paid by the plaintiff, and 14 days after that date these shares would become forfeited by virtue of the Act in that behalf. Then, on the 8th August in the *Argus* and on the 15th August in the *Age*, these shares were advertised for sale on the 26th August. After the time appointed for the sale the manager of the company inserted a notice postponing the sale until the 6th of September. Nothing was done on that day, but on the 16th October the shares were again advertised for sale on the 25th October, and on that day they were sold. The plaintiff attacks this transaction first on the ground that the call made on the 19th June was invalid, because it was not duly advertised, or even if the call was good the shares could not be forfeited for non-payment of that call because it was not duly advertised. Now, the call was made on the 19th of June, and it was payable on the 9th July, it was advertised in the *Argus* on the 2nd July and in the *Government Gazette* on the 4th. There is no provision in the rules of this company as to how calls are to be advertised. Section 50 of "*The Mining Companies Act 1871*" provides:

"When a call shall have been made notice of the day when it will be payable and of the place for the payment thereof shall be published in the *Gazette* in a daily newspaper published in Melbourne and in one or more papers circulating in the locality wherein the registered office of the company shall be situated."

No time is fixed then, and I agree with the argument for the plaintiff that the advertisement when a call will be payable must be published within a reasonable time before the call is payable. It would not serve the purpose for which this Act was intended if the day before the call was payable it was advertised. Then it becomes a fact for me as a jury to consider whether this call was duly advertised. The registered office of the company is in Melbourne, the directors are in Melbourne, and I find that the advertisements of this call being on the 2nd of July in the *Argus* and *Age* and on the 4th of July in the *Government Gazette* were published a reasonable time before the time of payment of the call. It is immaterial that the company's operations were being carried on at Broken Hill; the Act only requires the call to be advertised where the office of the company is. A call which has only to be advertised in Melbourne and is payable in Melbourne is reasonably advertised if seven days' notice is given. Then it is

said that the plaintiff is not liable because the call was made at a time when the shares were lying in the hands of the company before the plaintiff bought and that shares in the hands of the company are not liable and therefore could not become liable when sold to him. In my opinion every share in the company was liable to pay calls. But the circumstance that the shares were held by the company is a reason why the company should not put its hand into one pocket merely to pay money into the other. There would be no sense in such a proceeding, but the shares *qua* shares were liable and therefore the call being payable after the plaintiff had become registered, he was liable for the payment of that call. A third objection is that the sale of these shares was invalid because they had been advertised for sale on the 26th August and were not then sold but that sale was purported to be postponed to the 6th of September, and they were not then sold and they were only ultimately sold on the 25th October. The plaintiff's contention on this point is that once the shares were advertised for sale, whether they were sold or not no other sale could ever take place. I do not think that that is a correct construction of the Act or it would be one extremely inconvenient and utterly unworkable in the management of companies. The directors of a company have power to sell forfeited shares, it is their duty to sell them and suppose a time is fixed for the sale and they cannot be sold the directors' duty does not cease, neither are they compelled to purchase them for the company. In my opinion directors have full power to appoint a second sale and that second sale gives a shareholder further time to come in and redeem the shares. I think that the sale that was held was perfectly regular and was not a postponement for more than 14 days of the original sale. That provision in the Act for so postponing a sale is a power given to the manager and by no means prevents the directors after an abortive sale from holding a fresh one. For all these reasons plaintiff's case had failed and judgment will be entered for the defendant with costs.

Solicitors for the plaintiff *Crisp and Cameron*.

Solicitors for the defendant, *Cuthbert, Hamilton Wynne and Co.*

PROBATE JURISDICTION.

(Before a'Beckett, J.)

IN THE ESTATE OF HECTOR AND MARGARET MUNROE.

October 22nd.

In re the estates of Hector and Margaret Munroe where there is no one entitled to a grant of administration. The Court will not grant administration of an estate during the minority of an infant to persons not entitled, though they be near relatives of the infant unless it be shown that it would be for the clear benefit of the infant that the grant should go.

These were two applications each for the grant of administration during the minority of an infant to

persons, who, though near relatives of the infant were not entitled to administer.

Mr. Hayes appeared in support of the applications.

Cum ad vult.

October 29th.

MR. JUSTICE A'BECKETT.—In each of these cases application has been made for the grant of administration during the minority of Hector Crofton Munroe, now 17 years of age. Hector Munroe, his father died intestate in November, 1875, leaving Margaret, his widow, and two children, Hector Crofton and Alexander. The widow administered, and died intestate in July, 1891, not having fully administered the estate. Alexander died under age. Under the father's intestacy Hector Crofton Munroe is entitled to property valued at £1,211, and under the mother's to property valued at £1,300. In both applications the interest of Alexander, the deceased's brother, is treated as if it had never existed, and no administration to his estate was necessary, because the beneficial interest passed to Hector Crofton, partly through his mother and partly in his own right. The applications I have now to deal with are substituted for others which failed. In the first instance it was proposed that the Trustees, Executors, and Agency Company Limited should administer both estates. Mrs. Campbell, a paternal aunt, appointed the company to administer the father's estate, and Mrs. M' Rae, the maternal grandmother, appointed the company to administer the mother's estate. Application was made to Mr. Justice Webb for administration to the company, and was refused, because neither of the persons who nominated had any right to administration. Thereupon these nominators apply for administration to themselves instead of to the company on behalf of the infant, and as the applicants have no rights of their own I have to consider whether it would be beneficial to the infant to grant the applications. Amongst other circumstances affecting my discretion is the fact that in each case I am asked to sanction the administration bond being entered into by an incorporated company. This means that in each case payment will have to be made to the company. Although by the rules such a payment is not to be allowed to the administrator, I have little doubt that here the payment would be at the infant's expense. I do not suppose that his grandmother or his aunt intends to make him a present of the amount which she will have to pay when he comes of age. Each would hand him over his money less this deduction, and it is not likely that he would begin life by bringing actions against his nearest relations to recover what they had paid for him. Another fact to be considered is that property to the value of £1,101 in each estate consists of a half share in land, which was vested in the infant's mother, so that two administrators would have to concur in selling or dealing with one piece of land. It would obviously be desirable that the same person should have control over both shares. Another circumstance to be considered is that both applicants are married women, one living at Richmond, and another at Traralgon in Gippsland, and that one of them is so illiterate that she cannot write

her name. Taking all these facts together there is nothing now before me to commend the applications as beneficial to the infant. If no other means of obtaining administration presented themselves the Court might be constrained to accept two ineligible applicants instead of one who was eligible, but the office of curator of intestate estates affords a simple and cheap way out of the difficulty. The commission of L2 per cent. payable to the curator is the only charge in addition to the probate duty payable in any case. This relieves the estates from all charges for entering into administration bonds, and from claims which the administrators would be entitled to make for commission. The curator has the powers and discretion of an ordinary administrator as to investment and maintenance on behalf of an infant, so that in a simple case like the present his administration is *prima facie* preferable. The case is clearly within the act, as no person "entitled" is ready to take the grant. The present applicants are not entitled, though the Court could in its discretion make the grant to them. For the reasons already stated, I decline to make the grant on the facts now before me. If it can be shown that it would be disadvantageous to allow the curator to administer, or that granting the present applications would not involve the inconvenience and expense which I anticipate, and would secure advantages not disclosed in the present affidavits, the applications may be renewed.

Proctors *Attenborough, Nunn and Smith.*

IN THE SUPREME COURT OF TASMANIA.

August 1891.

IN BANCO.

COMMERCIAL BANK V. JONES AND ANOTHER.

Guarantee—release by deed of principal debtor—as to liability of guarantor.

At the trial the Bank obtained a verdict for L500 and interest, leave being reserved to the defendants to move to set aside such verdict and to have judgment entered for the defendants. The court was accordingly moved pursuant to the leave so reserved.

Mugliston :—for defendants.

The Attorney General :—for the plaintiff bank.

MR. JUSTICE DODDS :—In this action the plaintiff company obtained a verdict for L500 and interest against the defendants, as the executors of James Bonney, upon a continuing guarantee given by Bonney to secure advances to be made from time to time to G. A. Wakeham. Leave was given to the defendants at the trial to move to set aside the verdict on points reserved. Wakeham had given mortgages to the bank to cover his overdraft, and in October, 1889, when his indebtedness to the bank amounted to L2,390, he agreed with A. J. Marshall to convey to him all his interest in the properties mortgaged to the bank subject to the mortgages. Wakeham and

Marshall together saw the manager of the bank at Latrobe, told him what had been arranged between them, and asked him to accept Marshall as the bank's debtor in lieu of Wakeham, and discharge the latter. The manager consented to do so conditionally upon Marshall obtaining a guarantee. Subsequently the manager saw Bonney, explained the proposed arrangement to him, and Bonney consented to become surety for Marshall, and agreed that until he did so the guarantee for Wakeham was to continue. Steps were then taken to give effect to the arrangement, but instead of Wakeham conveying the properties to Marshall subject to the mortgages to the bank as had been agreed, the bank required those mortgages to be discharged, a conveyance from Wakeham to Marshall to be executed, and a new mortgage to be given by Marshall to the bank. Wakeham and Marshall consented to this, and the deeds were executed on February 6, 1891, but no guarantee was given by Bonney in respect of Marshall, and on April 12 Bonney died. The mortgage from Marshall to the bank was for L2,400, but Marshall received no money. It was contended on behalf of the defendants that the bank having discharged the mortgages, the guarantee has become inoperative, that the bank has released the surety by accepting payment from Wakeham, and that no moneys are now due. The bank contends that although it has by its reconveyances discharged the mortgaged lands there is still something due from Wakeham in respect of which they can claim against Bonney. It was also contended for the defendants that there has been a "novation." To constitute a novation by substitution, the intention of the creditor to discharge the first debtor and to accept of the second in his stead must be perfectly evident. I am quite satisfied that the bank had no intention of discharging Wakeham and his surety Bonney, and accepting Marshall alone in their stead. The evidence of the manager and Marshall shows that the consent to the arrangement between Wakeham and Marshall was conditional upon Marshall obtaining a guarantee, and in all probability if Bonney had lived the guarantee would have been given. The intention of the bank to still treat Wakeham as its creditor, and also hold Bonney responsible in respect of him, was shown by the condition to which Bonney agreed, that he was to remain liable under the guarantee for Wakeham until he gave one for Marshall. Moreover, Wakeham's account has not been closed, but still stands to his debit in the books of the bank. I think, therefore that it is doubtful whether there has been a novation. But be that as it may, the bank on the 6th February absolutely extinguished Wakeham's liability and declared by its deeds that all moneys due to it under the mortgages had been paid, and those mortgages more than covered the overdraft. The bank is estopped from taking up any other position and nothing being due by Wakeham, no claim can be made against his surety. The plaintiff Bank further contended that by terms of the guarantee they were at liberty to discharge the original debtor without affecting the liability of the surety, but I am inclined to

think that a closer examination of the language used will show that the right given is limited to discharge in respects of bills of exchange, etc., (see the guarantee), so that if there was anything due to the bank on Wakeham's account his discharge without reserve of remedies would extinguish the liability of his surety. However, I do not decide the case upon this point. The documents of the 6th February, and the mode of giving effect to the arrangement between the parties create the plaintiff's chief difficulty, and it is upon them that I have formed my opinion. The rule to set aside the verdict for plaintiff company, and to enter it for the defendants, is made absolute with costs.

The CHIEF JUSTICE: His Honor, who tried the case, and is consequently more conversant with its facts than I am, has fully stated them. The case presents itself to me this way. Wakeham was indebted to the bank for an overdraft; his debt was secured by mortgage from him of certain lands to the bank, and by a guarantee under the hand of Bonney. Marshall was willing to be substituted for Wakeham as the bank's debtor if Wakeham would transfer to him the land mortgaged to the bank. The bank was willing to accept Marshall as its debtor in place of Wakeham, and Bonney was willing to become surety for Marshall in lieu of Wakeham. Accordingly to give effect to this arrangement, on the 6th February, 1891, first, in consideration of £2,400, the amount of the debt then due by Wakeham to the bank having been paid, the receipt whereof the bank acknowledged the bank conveyed the mortgaged lands to Wakeham absolutely discharged from the mortgages. 2. Wakeham conveyed the same lands to Marshall in consideration of the sum of £2,400. 3. Marshall mortgaged the same lands to the bank for £2,400 and covenanted to pay it. The bank thus took Marshall's mortgage and covenant in lieu of Wakeham's mortgage and covenant for the payment of the debt of £2,400. By this transaction, which is in substance a "novation," the debt due by Wakeham to the bank was extinguished. The bank could no longer sue Wakeham for the £2,400 debt due to it, for that had now become the debt of Marshall. It is said that Bonney approved of the transaction, and promised that he would become surety for Marshall to the bank, and that until he did so his guarantee for Wakeham should continue. Bonney died in April, 1891, but no new guarantee was given by him before his death, and a guarantee must be in writing. The guarantee sued on then was a guarantee for a debt due by Wakeham to the bank, but that debt was extinguished by the transactions of the 6th February, 1891. To use the language of Pothier, "The surety is discharged by novation of the debt; for he can no longer be bound for the first debt for which he was surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt is not that debt for which he became bound." I concur in the opinion that the executors of Bonney are not liable on the guarantee

for Wakeham. The special provisions of the guarantee do not embrace the case which has arisen.

MR. JUSTICE ADAMS: "I have given full consideration to the evidence taken, and to the deeds referred to at the hearing of this case, and as the facts have been stated by the learned Judge who presided at the trial, it is unnecessary for me to go over the ground again. The conclusion at which I have arrived is that no new guarantee was given by the late James Bonney to the bank in substitution for his guarantee for Wakeham's overdraft, and that as the bank, during Bonney's lifetime, gave Wakeham a full receipt for all money advanced to him, Bonney's representatives are not liable to the bank on this guarantee he had given for such advances."

COMMERCIAL BANK V. JONES AND ANOTHER.

Sept. 25th 1891.

Application for leave to appeal to Privy Council—Charter of Justice.

The Attorney General moved *ex parte* for leave to appeal to the Privy Council. C.A.V.

The CHIEF JUSTICE:—This is a petition for leave to appeal to the Privy Council from the judgment of this Court, and that execution may be stayed. This action was brought by the plaintiff bank against the defendants as executors of one James Bonney, deceased, upon a guarantee given by Bonney during his life time to the bank, and the bank claimed £600. Upon the case coming on for trial the jury found a verdict for the bank of £500 and interest, subject to leave being reserved to move the Court to enter a verdict for the defendants on the ground that the testator's guarantee had been discharged by the action of the bank. The question thus raised was argued before the full Court, and the Court ordered judgment to be entered for the defendants. It is against this judgment that the plaintiff petitions the Court for leave to appeal to the Privy Council, and that execution may be stayed pending the appeal. The charter of justice empowers any person to appeal to the Privy Council from any judgment of this Court, pronounced in respect of any sum above £1,000. Such person must, within 14 days, apply to this Court for leave to appeal to the Privy Council, and the Court is to impose such terms as to security for costs staying execution, etc., as may appear to it most consistent with real and substantial justice. The charter also reserves to the Privy Council power upon the petition of any person aggrieved by any judgment of this Court to admit or refuse his appeal upon such terms as the Privy Council deem meet. This Court can therefore only grant leave to appeal where the subject matter (if money) amounts to £1,000. The amount in this case is only £500, or thereabouts, and this Court has therefore no jurisdiction to grant leave to appeal. The counsel for the plaintiff then stated that special leave to appeal would be applied for from the Privy Council, and asked for a stay of execution in the meantime. The execution would be for the defendants' costs. The circumstances under which La Cite de

Montreal and Les Ecclesiastiques du Simmaire de St. Sulpice de Montreal 14 App. Ca. 660, and the terms on which (*re Skinner L.R. 3*; *pc. 456* the Privy Council will grant such leave are to be found stated in the reports, but I cannot find that in any case where the Supreme Court has not had jurisdiction to allow the appeal, because the subject matter is below the amount to which its jurisdiction to grant appeals is allowed, such Court has attempted to stay execution or impose terms upon the litigants. I have looked through the digests of the cases decided in the neighbouring colonies, and can find nothing in support of the application on behalf of the bank that execution shall be stayed, pending a petition to the Privy Council for leave to appeal in a case in which this Court cannot grant such leave. The case of *Overell v. Robertson*, in the year 1869 in this Court, would tend to show that the Court thought that such a course might be taken, but the proceedings in that case were abandoned, and the case is one that cannot be relied upon as a precedent.

SHEELY v. RUSSELL.

Damages—Reduction of damages.

Action for not transferring certain shares—Measure of damages.

This was an action brought to recover £1,000 for the non-transfer of an interest in a certain Mining Company, and in which action the plaintiff obtained a verdict for £100. The defendant subsequently moved to reduce the damages to £50. The facts are set out in the judgment.

Mitchell for defendants.

Perkins for plaintiff.

On Aug. 21st the following judgment was given:—

THE CHIEF JUSTICE.—This is a motion on behalf of the defendant to reduce the damages from £100 to £50. Upon the argument the application for a non-suit was abandoned, and the question was confined to the reduction of damages. The action was brought (1st) for breach of contract by the defendant in not transferring to the plaintiff a share in a certain mine, for the purchase of which the plaintiff had paid the defendant the price; and (2nd) in trover, for the wrongful conversion of the scrip of such share by the defendant to his own use. The jury found a general verdict in favour of the plaintiff, with damages £100. The jury assessed this as the value of the share at the time of trial if the action had been brought within a reasonable time after the breach of contract. They also assessed the value of the share at £50 at the date of the breach of contract, and £1,500 at the date of the trial. The plaintiff had previously moved to increase the damages from £100 to £1,500 on the ground that the basis upon which the damages should be estimated was the value of the share at the date of the trial. This application was refused, and the defendant now moves to reduce the damages to £50 on the ground that the

value of the share at the time of the breach of contract is the correct measure of damages. Upon the rule coming on for argument counsel for the plaintiff contended that the verdict being a general one, it included the count for trover, and that upon that count the jury would not be bound by the ordinary rules as to damages applicable to a breach of contract to deliver goods or shares. The case of *Chinnery v. Vial*, 29 L.J., *Ex. 180*, seems to dispose of this contention. That was an action—1st, for not delivering certain sheep; and 2nd, trover for the sheep. The question of damage under the count for trover was raised as in this case. The Court held that the measure of damages was the same as in action for breach of contract to deliver; the Court went on to say, "The principle deducible from all the authorities is that a man cannot, by merely changing his form of action, vary the amount of damage, so as to recover more than the amount to which he is really in law entitled, according to the true facts of the case and the real nature of the transaction." The case, therefore, resolves itself into the question what is the true measure of damages where the plaintiff has paid his money to the defendant for the purchase of a share in a mine, and the defendant has either neglected to purchase, or to transfer when purchased. First it is clear that the plaintiff may elect to avoid the contract as violated, and to sue for the recovery of the money he has paid with interest; or secondly, he may hold to the contract, and sue for the damage he has sustained by its breach. The plaintiff has in this case adopted the latter course, and the question is by what measure of damages he is to be compensated. The law as to damage for the non-delivery of goods sold by the seller to the purchaser is calculated upon the difference between the contract price and the market price at the time for delivery, if the goods are not paid for, and if the price has been paid the purchaser is entitled to recover the full market value at the time appointed for delivery. But it was contended that a different rule prevails upon the sale of shares, and that in that case the market value of the shares at the date of trial is the basis of the measure of damages. For this contention *Owen v. Routh* 14 C.B. 337, is cited, and also the test of Addison on Contracts 954, which says that this would seem to be the rule. The case of *Owen v. Routh* was argued on one side only, and that argument convinced both the opposing counsel and the Court, but that case related to the loan of shares, and the argument expressly recognises the distinction between a sale and loan of shares. In *Shaw v. Holland*, 15 M. and W. 136, which was an action for the non-delivery of shares on a given day, Parke, B., says; "With respect to the amount of damages I was at first disposed to think that this was like the case of an action for not replacing stock (i.e. lent) in which the measure of damages is the difference of price between the day on which it ought to have been replaced, and on the day of trial; but upon consideration I think it more resembles the case of an action for the non-delivery of goods." Leake on Contracts, p. 1,058, says the same rule as to damages applies to a sale of shares as to a sale of goods, but distinguishes a loan from a sale of

shares or stock as to damages. Sedgwick, on damages, p. 311, says, "Actions for the non-delivery of railway shares, pursuant to a contract for sale, are to be distinguished from actions for not replacing borrowed stock, and in the former class of cases the market price on the day when the contract of sale is broken, instead of that on the day of trial, is fixed as the standard for the computation of damages." He adds, "In the English Common Pleas it was lately held that payment in advance did not affect the rule in such a case." The case referred to is *Loder and Kekule* 27, L.J. C.P., 27, which is the latest authority. In that case the price of 100 casks of tallow was prepaid; tallow of an inferior description was delivered, and the question arose whether in calculating the damage the value of tallow at the date of the breach of contract or at the date of the trial was to form the basis of calculations. The Court said, "We think that the pre-payment cannot be taken into consideration in apportioning the claims, and that the true measure of the damages would have been (if there had been nothing else in the case) the difference between the value of tallow of the quality contracted for at the time of the delivery, and the value of the tallow then actually delivered." Pre-payment, therefore, does not affect the general rule as to the sale of goods, and *Shaw and Holland* is a direct authority that the non-delivery of shares sold stands in the same position as to damages as the non-delivery of goods sold. The authorities show that there is a different rule for damages in the case of the breach of contract for the loan of stock or shares. The two cases in the Supreme Court of Victoria, cited by counsel for the plaintiff are cases in which mortgagees of shares improperly disposed of them, and the rule applying to the loan of shares was held applicable in their case. In both cases the shares were delivered to the defendants upon a trust which they violated: and in the latter one, *Amoretty v. City of Melbourne Bank*, 3 Austn. L.J. 171, Mr. Justice A'Beckett says:—"Elements of trust and contract have to be considered, which are not present in ordinary actions for the conversion of goods, which justify the adoption of a different measure of damages." In the present case there is only the ordinary contract to purchase and transfer shares, and nothing to take the case out of the ordinary rule; that the damages, the price being prepaid, are the value of the share at the date of the breach of contract, and this has been assessed at £50. The rule must be made absolute, as, however, the more important part of the rule for a nonsuit was abandoned by the defendant, and as the case appears to bear hardly upon the plaintiff, we make the rule absolute without costs.

Justices DODDS and ADAMS concurred.

SUPREME COURT SITTINGS.

(Before Molesworth J.)

PRESIDENT, ETC., OF DANDENONG V. DEVITT.

Nov. 12th.

Order to review—*Local Government Act 1890, s. 288*—

Rules—Demand for payment—A demand under sec. 288 of the Local Government Act 1890 may be sufficiently made by sending it through the post.

Order to review.

The complainants were the president, councillors, and ratepayers, of the Shire of Dandenong, and the defendant was one Michael Devitt, and the proceedings had been instituted to recover payment of £46 10s. rates due by the defendant in respect of certain premises at Cheltenham. At the hearing the collector of rates, *inter alia*, stated that he posted to the defendant an assessment notice which contained in addition a demand for payment. The envelope was addressed "Mr. Michael Devitt, Post Office, Cheltenham;" the letter was not returned. Mr. Michael Devitt, (the defendant) stated that he never received an assessment notice which contained a demand for payment, that his address was "Michael Devitt, Cheltenham." The justices made an order in complainant's favor."

At the hearing before the magistrates the original demand in writing was not put in evidence; no notice to produce the same had been served upon the defendant. The magistrates, nevertheless, admitted the evidence of the rate-collector, as above stated, although objected so on behalf of the defendant. The ground, so far as is material to this report, upon which the order to review was obtained was as follows:—"That no demand in writing for the payment of the rates sued for was proved at the hearing as required by law."

Mr. Dennistoun Wood moved the order absolute.

Mr. Donovan showed cause. A demand for payment of rates may be sufficiently made through the post. If it be proved that such a demand was posted it will be presumed to have been delivered in the ordinary course of post, such presumption may be rebutted by evidence that it was not delivered; that is a fact for the justices to determine. *R. v. O'Brien*, 3 W.W. and a.B. (L.) 54; *McKenzie v. Shire of Swan Hill*, 4 V.L.R. (L.) 299 were cited.

Mr. Dennistoun Wood.—The justices admitted secondary evidence of a document essential to the complainants' case, although no notice to produce the same had been served upon the defendant; the objection was taken before the justices and should have been regarded as fatal.

MOLESWORTH, J.—The order must be discharged with costs.

Solicitors, for complainants, *Budd*; for defendant, *Potts*.

(Before Molesworth, J.)

RE MACAULEY.

Nov. 20.

Stamps Act 1890, s.s. 93, 94—Lease.

Option to purchase—transfer.

A lease containing an option to purchase is not a "transfer" within the meaning of s. 94 of the Stamps Act 1890.

Applications to the courts under sections 71, 74 and 115 of the Stamps Act 1890, by a person dissatisfied with the ruling of the Collector of Imposts.

The case stated by the Collector of Imposts was as follows:—

1. On the 5th June 1891, one Thomas Shields, of Heatherton, in the Colony of Victoria, grazier, (thereinafter called the lessor) being the registered proprietor of an estate in fee simple in all those pieces of land being Crown Allotments etc., containing in all 1672 acres 2 roods 35 perches leased the said land to one William Macauley of Emu Plains in the said colony, grazier (thereinafter called the lessee) for the term of 3 years from the 14th May 1891 at the yearly rental of £1089 4s 0d.

2. The said lease contains a covenant that the lessee shall upon giving six months' notice in writing to the lessor at any time during the said term have the option of purchasing the said premises at the price or sum of £5 per acre.

3. The Collector of Imposts was required by the solicitors acting for the parties to the lease to express his opinion under the 70th section of the *Stamps Act* 1890 as to whether any and, if any, what amount of duty was chargeable on the said lease.

4. The Collector of Imposts was of opinion that inasmuch as the lease contained an option of purchase of the property leased for a stipulated sum the instrument was chargeable with duty under the 94th section of the *Stamps Act* 1890 upon the sum agreed to be paid by the lessee in the event of his exercising his option of purchase, namely, £5 per acre for 1672 acres 2 roods and 35 perches and which computes £8363 11s 10½ and he accordingly assessed the duty at £41 15s being the duty computed on £8350.

5. The said solicitors thereupon and pursuant to the said Act paid the duty so assessed and being dissatisfied with the said assessment required him (the collector of imposts) to state and sign a case setting forth the question upon which his opinion had been required and the assessment made by him, and he has therefore stated and signed this case.

Mr. Irvine in support of the application. The lease cannot be deemed a transfer within the meaning of section 94 of the *Stamp Act* 1890; the lease which is contemplated by that section contains two things; 1st, a consideration other than the rent must be paid or agreed to be paid; 2nd, a covenant for the future transfer or sale of the fee simple on the occurrence of any contingency express or implied must form part of the instrument. Admitting, for the sake of argument that this lease contains the second element, it, obviously, does not contain the first and is therefore not a "transfer" within the meaning of the section.

Mr. Mitchell, to oppose. The construction contended for would lead to a manifest absurdity. It would be open to any fraudulent persons, who wished to transfer property, to have a lease executed containing a covenant to transfer; the transfer could then be immediately executed and the payment of the duty evaded. With regard to the contention that, in this lease, there is no consideration, other than the rent, to

be paid, it is clear that the price to be paid on option is the "other consideration" for the lease.

Mr. Irvine in reply. The difficulty referred to would operate in both ways; a *bond fide* lease containing a *bond fide* option to purchase, never exercised, would if this contention were correct, be liable to pay duty as a conveyance on sale. The purchase money in case the option to purchase be exercised, is not money paid or agreed to be paid for the lease.

MOLESWORTH, J.—The application must be allowed. Declare the assessment erroneous. Order Collector of Imposts to repay £41 15s. 0d. to applicant with costs of application. Refer to tax.

Solicitors, for applicant, *Lamrock, Brown and Hall* to oppose; *Crown Solicitor*.

(Before Molesworth, J.)

O'CONNOR v. SEIYLER.

Nov. 13th.

Order to review—Customs and Excise Act 1890 ss 158, 164—*Direction of Chief Inspector of Distilleries*.

In a proceeding under the Customs and Excise Act 1890, it is not necessary for the informant to prove the direction of the Chief Inspector of Distilleries to the informant to lay the information.

Order to review.

The order directed that one John O'Connor the informant should show cause why a certain conviction made on the 22nd September 1891, whereby one John George Seiyler was fined in the sum of £10 and £20 12s. 6d. costs to be levied by distress, etc., on an information laid by the said John O'Connor setting forth that the said John George Seiyler "within the said Bailiwick did carry on the business of a wine and spirit merchant without having completed the registration of his name and premises and procured a license as directed by the *Customs and Excise Duties Act* 1890 contrary to the form of the Act," should not be reviewed, etc., upon the following ground:—

That the direction of the Chief Inspector of Distilleries to prefer the information had not been proved, etc.

The order to review was obtained by the defendant, John George Seiyler. It appeared on the depositions taken at the hearing of the case before the magistrate that the informant John O'Connor was a senior inspector of excise and distilleries; but it did not appear in evidence that he had obtained the direction of the Chief Inspector of Distilleries to lay the information.

Mr. Mitchell moved the order absolute.

Mr. Cussen showed cause.—It is not necessary to prove the direction of the Chief Inspector; if it is, the proof of the fact is upon the defendant; moreover,

it is the justice who takes the information, and he alone, who is to be satisfied that the Chief Inspector directed the information.

Mr. Mitchell.—All conditions precedent must be proved; the Act is silent as to who is to prove the direction of the Chief Inspector; by sec. 158 the onus of proof in a great many respects is imposed on the defendant, and inasmuch as the proof of the direction to lay the information is not specified, it is submitted that, on the authority of the maxim "*expressio unius exclusio alterius*," the informant is bound to prove it; Secs. 160, 164, were also referred to.

MOLESWORTH, J. (after reading the order to review), said:—The person affected by the conviction of the magistrate has obtained this order to review on the ground that it was necessary to prove at the hearing that the direction of the Chief Inspector had been given and that that fact was not proved. I am inclined to think that it was not necessary to prove it; I can see that there is a great deal of force in the view put by Mr. Mitchell, but, on the whole, I do not think it was necessary to prove the direction of the Chief Inspector. The order will be discharged with costs.

Solicitors—For applicant, *Garnson & Wallace*; to oppose, *Crown Solicitor*.

Before Hodges J.

McDOWELL V. MEADER.

Novr. 10th.

Vendor and purchaser—Specific performance—Description.

Land described in a contract of sale as at the corner of two streets, naming them, is a sufficient description within the Statute of Frauds.

This was an action by the plaintiff against the defendant seeking specific performance of a contract for the sale of land. The contract was as follows—

Doncaster, June 8th, 1888.

"I the undersigned, Herbert McDowell, of Templestowe, in the shire of Bulleen, have this day sold to Messrs. Wm. Meader and Richard Serpell both of Doncaster in the shire of Bulleen, all that piece of land containing twelve (12) acres more or less, situated at the corner of the roads known as the Middle Road and the Templestowe Road, being allotment section part of Unwin's special survey, with weatherboard cottages erected thereon, also stable, outhouses, &c., for the sum total of two thousand five hundred (£2,500) pounds, payment to be made as follows: nine hundred (£900) pounds cash deposit each (£50) the balance each (£250) pounds within twenty-one (21) days from the above date, the balance to be paid in three years (3) bearing interest at the rate of five (5) per cent. per annum, interest to be paid half-yearly. The purchaser to have the right to pay off the balance at any time, the interest to cease from the date of payment of sum total. This contract of sale is made with the understanding that I the undersigned, Herbert McDowell, hold one third share in the above property on the payment of one-third of the purchase money, payment to be made on the same terms and conditions as herein specified. The said Herbert McDowell to hold

possession of the house for three months from the date of resale of the said property.

H. McDowell.

We the above-named William Meader and Richard Serpell, hereby agree to the above-named contract.

R. Serpell.

Wm. Meader.

The plaintiff claimed specific performance by the defendant of his part of the contract, and payment of the money owing on account stated under the contract, or in the alternative £1,000 damages.

The defence was that the defendant did not admit any of the allegations in the statement of claim, or in the alternative, even if the allegations were true, sec. 208 of the *Instruments' Act* 1890 had not been complied with, to which the plaintiff replied by an allegation of part performance.

Mr. Duffy and *Mr. Woinarski* for the plaintiff, opened the case.

Mr. Anderson for the defendant. The description of the land in this contract is not sufficient, *Corcoran v. O'Rourke*, 14 V.L.R. 889, *Parker v. Barnett*, 16 V.L.R. 214, *Watson v. Issell*, 16 V.L.R. 607.

MR. JUSTICE HODGES: I have only one course open to me, viz., to refer the matter to the chief clerk. I think that the description of the land in the contract is sufficient, and no part performance has been proved. The land is described in the contract as—

"All that piece of land containing twelve (12) acres more or less, situated at the corner of the roads known as the Middle Road and the Templestowe Road, being allotment section part of Unwin's special survey, with weatherboard cottages erected thereon."

That in my opinion is a sufficient description of the land, and I think the plaintiff is entitled to specific performance. I shall refer the matter to the chief clerk on the question of title and upon the plaintiff making title, I direct that the defendant pay to him the sum of £540 16s. 3d. Reserve question of costs. Liberty to apply.

Solicitor for the plaintiff, *Finlayson*; Solicitors for the defendant, *Anderson and Son*.

(Before Hodges, J.)

SHAW V. HYETT & ANOR.

Sept.

An uncertificated insolvent with the knowledge and permission of his trustee in insolvency, and the creditors under the insolvency contracted liabilities subsequent to the insolvency. Held that the subsequent creditors were entitled to payment of their debts in priority to any of the creditors under the insolvency.

This was an action by the trustee in insolvency of one John Philip Motteram, an uncertificated insolvent deceased, against the executors of the said John Philip Motteram, claiming payment of any monies collected by the executors, a transfer of his property and accounts, and enquiries as far as necessary. The

defendants counterclaimed against the plaintiff joining the creditors who had proved under the insolvency and who, according to the defendant's case, had been paid in full, and sought a release of the estate from sequestration.

The statement of claim set out that (1) The plaintiff is an official assignee of insolvent estates under the Insolvency Statute 1865. (2) The late John Philip Motteram of Sandhurst being insolvent within the meaning of the said Statute, his estate was adjudged by the Court to be sequestered on or about the 16th June 1868 and the plaintiff was appointed to be the official assignee thereof. (3) After the adjudication of sequestration the said John Philip Motteram carried on business as a solicitor and acquired considerable property. (4) No certificate was granted or allowed under the said Statute to the said John Philip Motteram. (5) The said John Philip Motteram died on the 23rd April 1890 leaving a will by which he appointed the defendants his executors. (6) Probate of the will was granted to the defendants on the 15th May 1890. (7) The defendants have taken possession of the said property acquired by the deceased amounting in value to about £3000, treating it all as belonging to the deceased and in so taking possession the defendants have received monies which were lodged by the deceased on fixed deposit with banks and have collected many debts which were owing to him, and the defendants refuse to transfer the said property or to pay the said monies or any part thereof to the plaintiff. The plaintiff claims £3000. Payment of the amounts collected and transfer of the said property. Accounts and enquiries if and so far as necessary. The defence and counterclaim stated—(1) The defendants do not admit any of the allegations in paragraph one of the statement of claim. (2) They admit paragraph two of the statement of claim. (3) They admit that after the said sequestration the said John Philip Motteram carried on business as a solicitor but save as aforesaid they do not admit any of the allegations contained in paragraph three of the statement of claim. (4) They admit paragraphs four five and six of the statement of claim. (5) Save that they do not admit having taken possession of property acquired by the deceased, or that they have in so taking possession received monies and collected debts they admit paragraph seven of the statement of claim. (6) The said John Philip Motteram in carrying on business as aforesaid which he did to the knowledge and with the permission of the plaintiff and of the creditors under the said sequestration incurred considerable debts many of which are still owing and obtained credit from many persons who advanced monies and goods to him on the faith of his being permitted so to carry on business and they will contend that the creditors to whom debts were incurred or who advanced money or goods subsequently to the said sequestration are entitled to be paid out of any property or monies of the said John Philip Motteram in the hands of the defendants in priority to the creditors who proved under the said sequestration, and they will further contend that the plaintiff is not entitled to the payment of the

amounts alleged to have been collected or transfer of the said alleged property as claimed in this action and that in the circumstances aforesaid the action cannot be maintained.

In the alternative the defendants say that all the creditors of the said John Philip Motteram who have proved their debts under the said sequestration have been paid in full or their debts have been satisfied or released and all proper costs and charges of or connected with the said sequestration or properly payable out of the estate of the said John Philip Motteram have been satisfied and the defendants will contend that no such order as that claimed ought to be made.

Counterclaim (1.) The defendants repeat paragraphs 2, 3, 4, 5 and 6 of the statement of claim, so far as admitted by the defence. (2.) They repeat paragraph 7 of the defence down to and inclusive of the words "have been satisfied." (3.) The only creditors who proved their debts under the sequestration were Hopkins and Drought and the respective debts due to the said Hopkins and Drought were satisfied by the said John Philip Motteram after his becoming insolvent by monies obtained by him subsequent to the said sequestration and without the knowledge of the plaintiff Shaw. And they counterclaim (1) A declaration that they are entitled to have transferred and conveyed to them all the estate and interest of the defendant Shaw in the property of the said John Philip Motteram which was vested in the said plaintiff by virtue of the said order sequestering the estate of the said John Philip Motteram. (2.) An order directing the said Shaw to execute all proper and necessary transfers conveyances or documents for the purpose of vesting in the defendants this said estate as executors of the said John Philip Motteram.

Reply—(1.) Except in so far as the defence admits the statement of claim he joins issue. (2) As to paragraph 6 he will object that even if the defendants are entitled to pay creditors whose debts accrued after sequestration the plaintiff is entitled to the surplus of the assets of the deceased insolvent after such payments and the plaintiff as to the counterclaim says (1) He does not admit any of the allegations of paragraph 7 of the defence so far as repeated in the counterclaim. (2) Except that the only creditors who proved their debts under the sequestration were John Hopkins and John Philip Drought and that if the debts due to these creditors were (as alleged) satisfied by the insolvent after sequestration by monies obtained by him after sequestration they were satisfied without the knowledge of the plaintiff, he does not admit any of the allegations of paragraph 3 of the counterclaim. (3.) He will submit that the alleged fact that all the creditors who have hitherto proved have been satisfied would not entitle the defendants Hyett and Motteram to the declaration or the order prayed for.

Defence by John Hopkins to counterclaim (1) He denies that the debt or any part thereof due by the said John Philip Motteram to this defendant was paid or satisfied by the said John Philip Motteram

after he became insolvent by any monies obtained by him subsequent to his said sequestration and he says that the same is now wholly due and unpaid. (2) He will object that the allegations in the counterclaim disclose no legal claim against this defendant for if true the said defendant ought not to be joined in this action as a party to the counterclaim and if untrue the allegations are wholly immaterial as between the original parties to this action.

Defence by J. P. Drought to the counterclaim—Admitted that he had been paid his debt in full by monies obtained by the insolvent subsequent to the sequestration.

Reply to John Hopkins—(1) They join issue. (2) They will contend that the said defendant is a necessary party to the counterclaim inasmuch as the court will not determine as against him that his said debt has been satisfied without the privity of the defendant Shaw in the absence of the defendant Hopkins.

Mr. Duffy and Mr. Power for the plaintiff opened the case.

Mr. Irvine for the defendants executors. The creditors subsequent to the insolvency are entitled to have the estate released. *Troughton v. Gitley* 1 Ambler 630; *Tucker v. Hernaman* 4 De G. McN. and G. 395 *Evans v. Birch* 3. Campbells R. 10; *In re Rutherford*, 14 Ch. D. 687.

Mr. Box appeared for the defendant Hopkins.

Mr. Duffy in reply. The case of *Troughton v. Gitley*, 1 Ambler 630, and *Tucker v. Hernaman*, 4 De G. McN. & G. 395, do not apply. At the time those cases were decided there was no bankruptcy as we understand it. *Exp. Martin*, 15 Ves 115, disparages *Troughton v. Gitley*, which is explained in *Exp. Ford*, 1 Ch. D. 527; *In re Hodgson*, 31 Ch. D. 177.

Mr. Irvine.—*Eagleback v. Nixon*, L.R. 10 C.P. 645, extends the principle of *Troughton v. Gitley*. I would also refer the Court to *Exp. Bolland*, 9 Ch. D. 12.

Cur. ad. vult.

Nov. 20th.

MR. JUSTICE HODGES.—This action is brought by H. S. Shaw, the assignee in insolvency of J. P. Motteram, who after insolvency continued to carry on his practice as solicitor at Sandhurst, against Hyett and Motteram, who are the executors under the will of the same person, J. P. Motteram, and who as such executors have possessed themselves of the property which Motteram acquired by the exercise of his profession after the insolvency. The plaintiff seeks to possess himself of all the property which was acquired by the insolvent subsequent to the insolvency, and which has got into the hands of the defendants. The defendants say that Motteram, after his insolvency, continued to practice his profession as an attorney, and that he did this with the knowledge of the plaintiff and the creditors, and that he incurred considerable debts, many of which are still owing, and that he obtained credit from many persons on the faith of his being so permitted to carry on business, and they claim that under the circumstances all creditors subsequent to the insolvency are entitled to priority to the creditors who proved under the insol-

veny. They further say that all the creditors who proved under the insolvency have been paid in full. The first matter I have to deal with is a question of fact. Motteram became insolvent in May 1868. At that time he was practising as a solicitor in Sandhurst. He continued to practice as such solicitor after his insolvency, and immediately after his insolvency the plaintiff writes to him a letter, dated the 28th May, in which he directs him to keep accurate accounts of all the receipts and disbursements in respect of the business conducted by him as solicitor, informing him that he will have to render an account of himself up to the date of his obtaining his certificate. So that it is beyond dispute that he was practising the calling of his profession with the knowledge and concurrence of the plaintiff, his assignee in insolvency, and the plaintiff assignee himself says that he was not only aware that the insolvent was contracting liabilities, but that he was perfectly alive to all that was being done, so that he was thoroughly alive to his own rights, and thoroughly alive to the responsibilities of the insolvent. The creditors who proved under the insolvency appear to be only two, Hopkins and Drought. Hopkins does not deny that he knew that the insolvent was carrying on the business of a solicitor in Sandhurst, and it appears in fact that there were a variety of transactions in which Hopkins was acting for other parties immediately after the insolvency. I take it that Hopkins also knew that Motteram was carrying on business in just the same manner after the insolvency as he had been before it. Drought was in the same position, and Drought knew that he was paid by the earnings made. With regard to other creditors, if there were any, no others having proved, I have no doubt that they all knew that Motteram was carrying on his business after the insolvency just the same as before. The defendants have proved these facts beyond doubt. Then it is said that creditors subsequent to the insolvency are entitled to priority as against creditors under the insolvency. A long string of cases commencing with *Troughton v. Gitley* 1. Ambler's, reports 630, and continuing down to *Engelback v. Nixon*, L.R. 10 C.P. 645, appear to me to establish the proposition that persons who deal with an insolvent fearlessly and honestly after his insolvency, in a calling that he is carrying on with the knowledge of the trustees, have a right to be paid in priority to creditors under the insolvency. The principle upon which that right is founded may be in some doubt, and at various times some doubt has been expressed as to that principle, and to what extent that principle can be pushed, but beyond saying that *Tucker v. Hernaman*, 4 De G. McN. & G. 395 was a case decided upon special facts, no case impugning the correctness of that decision has been cited, and that decision to my mind applies to this case as closely as it is possible for one case to apply to another. The facts are marvellously alike even to the calling of the individual who became insolvent. Motteram was insolvent in 1868, and from that date till 1890 when he died, he carried on the profession of an attorney without interruption, without interference, and without impediment of any kind. He acquired

property, he had money passing through his hands as an attorney, he had an office, and it was not until after his death that any question arose as to the rights of his then creditors. The principle may be in doubt, but I think the decisions are clear, and I cannot see any possible injustice that this law can work. If a person entrusts an insolvent with money after the insolvency, ought he not to get the profits out of it as against prior creditors; it cannot do any harm to previous creditors. Mr. Duffy tried to distinguish *Tucker v. Hernaman*, and that class of cases by saying that under the *Insolvency Act*, hereafter acquired property passed in the same way as previously acquired property, but that the English Act was different from ours. But I think that an examination of *Herbert v. Sayer* 5 Q.B. 965, and *Cohen v. Mitchell*, 25 Q.B.D. 262, compared with *Sartori v. Laby*, 9 V.L.R. 329, show that future acquired property passes into the same hands under the English Acts, and under the Victorian Statutes, therefore, I am of opinion that subsequent creditors are entitled to payment in priority to previous creditors. Then the question arises as to whether or not, even if that were so, plaintiff was not entitled to any balance over and above the amount necessary to pay all subsequent creditors, and it was suggested that an order to that effect ought to be made by this court. I think that *Tucker v. Hernaman* shows that I ought not to make such an order. I do not know at the present time that there is one penny that any party under the previous insolvency is entitled to, and therefore I do not see any reason for making any order to pay over any balance to the assignee, in order that he may hand it over to be dealt with according to trusts of the will. It would be idle for me to do so. I think if I have to make an order at all I will make an order similar to that made in *Tucker v. Hernaman*. Now I come to deal with the counter-claim. The defendants in this action claim by their counter-claim to have paid the only two creditors who have proved, all that was due to them, and that, therefore, they are entitled to have the estate released. One of the creditors admits that he was paid all that was due to him. The other creditor disputes that fact, and it is for me to say as a jury whether or not I find that J. P. Motteram paid Hopkins the money which he was entitled to get under the insolvency. Motteram was insolvent in 1868, and Hopkins proved immediately afterwards for the sum of £408 15s. 9d. He had previously issued a fraud summons against Motteram to compel payment of Motteram's indebtedness to him, and that fraud summons was the reason for Motteram petitioning the Insolvent Court. So that in 1868 Hopkins was not inclined to show any mercy to Motteram, but was determined to enforce the payment of the moneys due to him without any consideration for Motteram. Hopkins then proved on the estate for the sum of £408 15s. 9d. I have had considerable doubt whether that sum of £408 15s. 9d. was really due. There are certain cheques about which some evidence was given which leads me to think that that sum was not due to Hopkins, and there was some evidence given by Hopkins with reference to a bill of costs in Motteram's

handwriting that lead me to the conclusion that that amount was not due to Hopkins. However, I am not called upon to consider that question in these proceedings. In the same year he writes a letter in which he says:—"In reply to yours of the 23rd instant I beg to acknowledge receipt of a bank draft for twenty pounds which leaves a balance of two hundred and eighty pounds still due to me. I am willing to carry out my arrangement with you on the same terms, viz., £25 cash and your acceptances for £11 10s. each payable monthly extending over a period of twenty-four months, the said acceptances to be endorsed by Mr. Rigby. The attachment to issue in default. You are well aware that this was the arrangement made so that I cannot see how you could have been surprised at what you saw in the *Argus*." So that between the date of proving and the 24th November 1868 the amount of £408 15s. 9d. had been reduced to the sum of £280. He says "I am willing to carry out my arrangement with you on the same terms, viz., and so forth. Now I have no information except the statement of Hopkins that he had agreed to take £300 but how the sum was reduced to £260 from £408 15s. 9d. I have no evidence. I have no evidence of payment nor have I any correspondence showing how this reduction was arrived at. I have a statement that it was reduced to £280. I am more disposed to think that in the interval other moneys had been paid or if other moneys had not been paid during the interval then the inference would be that Hopkins had been told that that was the amount owing to him and that he admitted that no more was owing to him. Now it has been very unfortunate, but there is an entire absence of all communication between the parties relative to this subject matter from the 24th November 1868 till April 1890. Hopkins who says in his letter of the 24th November 1868 that a sum of £280 is due to him and that he is willing to take it in a particular way never writes another letter or deals with the subject matter in any way until the year 1890. He allows the matter to stand over for 22 years without making any claim. If the matter stood there and if it were not for the evidence given by Mr. Hopkins I should think that this arrangement mentioned in this letter had been carried out by Motteram paying the money and we hear no more of the attachment until we hear of the attachment in Watson's matter which was not proceeded with, and except that not one single word has been said for over twenty-two years. Hopkins however, says that he has not been paid and in January 1891 he writes this letter to Hyett one of the executors in which he says that the amount of his claim less interest is £408 15s. 9d. In November 1868 he said that the balance due to him from the estate was £280, and the first time he makes a claim which has been lying dormant for 22 years is after the death of the only person who could give evidence contradicting his claim; and then he claims the full amount of £408 odd as if he had never been paid one penny and what makes the matter worse is his evidence. One might have thought that the matter had been forgotten and that the payments had been made and the arrange-

ments spoken of in that letter of the 24th Nov. 1868 had been carried out. But Hopkins in his evidence says I was aware of that payment of £20 at the time the action was commenced, I was not aware of the existence of that letter. Then he says in 1891 when I wrote that letter claiming £400 odd I knew that a less sum was due. So that Hopkins informed the court that he made a claim for £408 15s 9d against the estate of a deceased person knowing at that time that that claim was dishonest and that that money was not due and after that I am asked to believe and to infer that the money has not been paid. Hopkins probably perceived the difficulty he was in that if he admitted that money had been paid which he had forgotten he was cute enough to know that a suggestion would be made and an inference drawn that he had forgotten other payments and therefore he put himself in the position of having to admit that he had made a false and dishonest claim on the estate of a deceased person. So far as this part of the case is concerned I have had no doubt from the time the evidence was given, but I desired the matter to stand over in order that I might consider the matter more calmly, that an officer of this court could give evidence of this character. I have gone through the evidence again and again to see if I could not put some other construction upon it, to see if I could not reconcile it with fair and honest dealing and having failed to do so I am bound now to express the reasons why I cannot accept Hopkins' statement. That letter of the 24th November 1890 was only found by accident and it was a mere chance that that letter was not burnt or lost and if that letter had been destroyed and not accidentally discovered this Court would have known nothing of it and I should have taken Hopkins' statement without hesitation and would have declined to have presumed payment against any presumption drawn from lapse of time.

Another witness Rigby, a clerk of Motteram for a while and who appears to have separated from Motteram not on the very best of terms, gives evidence which, to my mind, is utterly unsatisfactory and I decline to accept Rigby's evidence also. According to his evidence moneys were paid by him and that a book was kept in which entries were made by him. A son of Motteram was in court and the witness was asked if he was prepared to contradict him and he said No! Then he shuffled and said that it was not necessary to contradict the son because this book was kept in secret and no one would understand it except witness and the deceased. I do not understand how such a book is to be kept and that the son should have no knowledge of the existence of a book in his father's office in which the accounts are kept. I therefore decline to attach any weight to Rigby's statement and inferring from the long lapse of time and the absence of all letters by the creditor to the debtor who at one time was not prepared to give any mercy to his debtor and by the fact that from time to time the amount due was reduced I have come to the conclusion that that money has been paid. There is much more evidence in the same direction

but so much as I have referred to impresses me that I ought to draw that inference. Then comes the question can I make the order that the defendants ask for by their counterclaim, that the estate be released. On the evidence of the executors I do not feel myself in a position to make such an order, because I am not satisfied that there may not be other creditors, one at least, who may have some claim on the estate not yet disposed of. I therefore propose to make the order that was made in *Trucker v. Hernaman* with some very slight variations. There will be practically on the whole an order directing the estate to be administered. There will be a declaration as to the order in which the monies are to be applied, in the first instance in payment of the creditors subsequent to the insolvency, in the next instance to plaintiff as trustee for any persons who can beshown are entitled to prove, or to be paid out of the insolvency (other than Hopkins and Drought); balance to go to the executors to be dealt with according to the trusts of the will. A declaration that accounts of all monies received and paid by the executors would have to be taken. The form of the order will be the form given in *Saton on Decrees*, 3rd Ed. pp. 158, 159, with some very slight alterations. There remains now only the question of costs. I had felt disposed to make the plaintiff bear the costs of the greater portion of the proceedings, but consideration has led me to think that each party should bear their own costs, as it is a fact that Hyett himself has been conducting his own business out of the ordinary course of dealings, and has been paying the creditors outside of the assignee instead of through the assignee, in order that he might distribute the moneys amongst all the creditors equally. Both have been parties to that and that to some extent has landed the parties in their present difficulty, and Motteram is as much responsible as either Hyett, Hopkins, or Drought. I think, therefore, that the parties here should bear their own costs, but I do not mean to say that the defendants are not to get their costs out of the estate; they have done nothing more than their duty in defending the will, and their costs will come out of the estate. The minutes of decree to be drawn up and submitted to me.

Solicitor for plaintiff, *Hopkins*; solicitors for defendants, *Fox & Overend*.

PRACTICE COURT.

(Before Molesworth, J.)

IN RE HERBERT WARREN, AN INFANT.

Nov. 30.

A., the mother of an infant 3 years of age, agreed with B. to hand over the infant to him in consideration that he would provide, clothe, maintain, and educate the infant, B. to have the custody of the infant until he should attain the age of 21 years. After the infant had been in the custody of B. for 5 years, A. obtained a writ of habeas corpus for the delivery up of the child to her. Held that the mother, notwithstanding that she had made an agreement of the above character, was entitled to possession of the child, and the child was ordered to be delivered over to her.

This was an application by Mrs. Lydia Knight, the mother of an infant, Herbert Warren, under a writ of habeas corpus directed to Phillip Wirth, calling upon him to show cause why he should not deliver up possession of the infant into the custody of the applicant. By an agreement dated the 25th January 1886, it was agreed between Mrs. Knight (then Mrs. Warren) and Phillip Wirth that he should take the infant, Herbert Warren, who was then about three years old, and should teach him the profession of an acrobat and a circus rider, and it was further agreed that Phillip Wirth should provide for, clothe, maintain, and educate the infant until he should attain the age of 21 years.

Mr. Pennefather in support of the application.—The mother of a child cannot deprive herself by an agreement of the right to the custody of the child. The wishes of the child itself are not to be consulted. *The Queen v. Barnardo*, 1891 1 Q.B.D. 194; *In re Wignore*, 16 V.L.R., 123; *The Queen v. Barnardo*, 23 Q.B.D. 305.

Mr. Fink to oppose.—The child was taken under a deed of adoption. If the child is examined it will be found that he is desirous of remaining with his present protectors. In the cases referred to the child was not to be taught any trade or business. Mr. Wirth has carried out his part of the agreement.

MR. JUSTICE MOLESWORTH.—In this matter of Herbert Warren, the application before me is the return of a writ of habeas corpus, and the substantial question to be determined is whether the mother of this boy is entitled to the custody of the child as against Phillip Wirth. It appears that on the 25th January 1886, the mother entered into an agreement between herself and Phillip Wirth, by which she purported to hand over the child, who was then about three years old, to Phillip Wirth, he agreeing to provide for, clothe, maintain, and educate the boy until he should attain the age of 21 years, and the boy has been with him ever since. The mother's affidavit says that Wirth has not performed his part of the agreement and that he had ill-treated the boy. The affidavit purports to be made upon information obtained

from the boy, and it may be that the boy told untruths to his mother which induced her to make these statements. They were denied by Mr. Wirth in his affidavit, and it may be Mr. Wirth never ill-treated the boy as alleged. But I would be prepared to decide that the mother has the right to the custody of the child, even in the absence of a number of recent authorities cited by Mr. Pennefather. These authorities, *The Queen v. Barnardo*, 1891 1 Q.B.D. 194; *In re Wignore*, 16 V.L.R. 123; *The Queen v. Barnardo*, 23 Q.B.D. 305; only affirm what I understand to have been the undoubted law for years, viz., that in a case of this kind the mother, notwithstanding the fact of her having made an agreement of this character, is entitled to the custody of the child. I think, therefore, that the applicant ought to succeed, and that she is entitled to the custody of the child. I would not have visited Mr. Wirth with costs if he had not repeatedly refused to give up the child to the mother upon her requesting the child back again. But as he has taken upon himself to test his legal right to the custody of the child and has failed, it is only right that he should bear the costs. The boy will be handed over to the mother. Costs £7 7s.

Solicitors for the applicant, *McFarlane & Tolhurst*;
Solicitors for the respondent *Gaunson & Wallacs*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., a'Beckett and Hodges, J.J.)

SARGOOD v. VEALE.

Oct. 27, 30.

Crimes Act, 1890 s.s. 100, 527—Informant—Penalty.
An information for an offence against an enactment for the benefit of the public at large may in general be laid by anyone, independently of any authority from the party or parties to whom the penalties to be recovered are awarded by law; and in such a case where no form of information is expressly authorised the information should purport to be laid in accordance with the law which determines the parties for whose benefit the penalties are to enure wholly or in part.

Order to review.

The defendant was charged under section 100 of the Crimes' Act 1890 with stealing, taking and carrying away one dray load of dead wood the property of Harold Charles Wilson then lying on land at Yarraberb in the occupation of the said Wilson. The information was laid by John Henry Sargood who was described in the information as manager of the Yarraberb estate and it was alleged that the stealing of the said wood was to the amount of one shilling at the least. The defendant pleaded guilty, but the police magistrate dismissed the information on the ground that the informant not having an interest in the penalty could not lay the information. An order

nisi was taken out by the informant to review this decision. There was no appearance to show cause.

Mr. Cussen appeared to move the order absolute. He referred to secs. 100, 527 *Crimes Act 1890*; sec. 3 *Public Moneys Act 1890*. *Tarry v. Newman* 15 M. and W. 645; *Robinson v. Curry* 7 Q. B. D. 472; *Hawkins Pleas of the Crown* p. 368; *Paley on Summary Convictions* p. 74; *R v. Panton ex parte Schuh* 14 V.L.R. 529; *Cole v. Coulton* 25 L.J.M.C., 125; He distinguished *Bradlaugh v. Clarke* 8 App. Cas. 354 as being a *qui tam* action.

Cur. ad. vult.

HIGINBOTHAM, C.J.—Order to review. The defendant was charged under Section 100 of the *Crimes Act 1890* with stealing, taking and carrying away one dray load of dead wood, the property of Harold Charles Wilson, then lying on land at Yarraberb in the occupation of the said Wilson. The information was laid by John Henry Sargood, who was described in the information as the manager of the Yarraberb estate, and it was alleged that the stealing of the said wood was to the amount of one shilling at the least to wit, eight shillings. The defendant pleaded guilty. The Police Magistrate, without going into evidence of the value of the dead wood stolen, dismissed the information and discharged the defendant, on the ground that the informant, not having an interest in the penalty, could not lay the information. This decision was erroneous, and is not warranted by the judgment in *Reg. v. Panton exp. Schuh*, 14 V.L.R. 529, and the authorities referred to in that judgment on which the magistrate appears to have relied. The right to lay an information for offences created by Statute depends upon the intention of the legislature as expressed in the terms of the Statute. An information for an offence against an enactment for the benefit of the public at large may in general be laid by anyone, independently of any authority from the party or parties to whom the penalties to be recovered are awarded by law; and in such a case, where no form of information is expressly authorised, the information should purport to be laid in accordance with the law which determines the parties for whose benefit the penalties are to enure wholly or in part. *Cole v. Coulton* 2 E. & E. 695; 29 L.J.M.C., 125. A different rule applies in cases where the act prohibited by Statute is a grievance to an individual only in respect of which a penalty is given by statute to the party aggrieved by way of redress (per Cockburn L.J., in *Cole v. Coulton*, 2 E. & E. at p. 702, 3.); or where the offence is against an enactment relating to a matter of purely local concern, and not of general interest or affecting the general public (*Reg. v. Hare, ex parte Bush*, 18 V.L.R. 71); or where the offence charged is the breach of a law the enforcement of which is committed by statute to local authorities. (*Reg. v. Panton, exp. Schuh*, 14 V.L.R. 529 and see as to this case *Kean v. Schuh*, 16 V.L.R. 199. In any of these cases an information cannot be laid by a person who is not interested in the penalty and who is not duly authorised to lay the information by a party interested or by statute. The offence charged

in this case is included in Division 2 of Part I of the *Crimes Act 1890* under the head of "Larceny and similar offences" it therefore clearly belongs to a class of offences against the public at large. The sum of money forfeitable on conviction for the value of the property stolen is payable to the party aggrieved (section 527) that is to say, the occupier of the land from which the wood has been stolen and his title to this part of the penalty is sufficiently recognized by the informant in this information. The order to review will be made absolute, but without costs. The order dismissing the information will be set aside and the case remitted for hearing.

Solicitor in support, *Crown Solicitor*.

SUPREME COURT SITTINGS.

(Before Webb J.)

MACKIE V. CLOUGH AND OTHERS.

September 5th.

The directors of a company which had existing liabilities sold the machinery of the company which constituted the whole of its available assets and out of the proceeds arising from such sale two dividends were declared and paid. In an action by the liquidator of the company against the directors and the manager it was held that the plaintiff was entitled to recover from the directors as much of the sum obtained from the sale of the machinery as would be necessary to satisfy all the creditors of the company. Held also that no action would lie against the manager as he was merely the servant of the company.

This was an action by the liquidator of the New North Britain Gold Mining Company against the directors and Manager of the company by which he sought to compel the defendants to refund the sum of £271 15s 8d or so much thereof as was necessary to satisfy the debt of one Terrill a creditor of the company. The facts appear in the judgment. The defence was that the action was not brought in accordance with the provisions of the Statute in that behalf provided, and further that the winding up order was bad.

Mr. Skinner (with him *Mr. Isaacs*) for the plaintiff.

Mr. Helm (with him *Mr. Lewis*) for the defendants.

MR. JUSTICE WEBB.—This is an action by the liquidator of the New North Britain Gold Mining Company against the Directors and the Manager of the Company and its seeks to recover from the defendants the sum of £271 15s 8d or so much thereof as is necessary to pay the debt of one Terrill and his costs. This is practically an action to make the defendants refund the amount of two dividends which they have paid out of the assets of the company. The circumstances are these. Terrill was a creditor of the company and he gave notice to the directors of his claim and though the directors had that notice they proceeded to distribute as dividends certain proceeds which had come into their hands by reason of the

sale of certain machinery which had been the property of the company, these proceeds being the only assets of the company and thereby leaving nothing to answer Terrill's claim. Now section 236 of the Companies Act 1890 provides that :—

"No dividend shall be payable to the shareholders of any company except out of the profits arising from the business of such company. If any director of a company shall wilfully pay or permit to be paid any dividend otherwise than out of such profits, he shall be liable to a penalty of not less than one hundred pounds nor exceeding five hundred pounds, and in default of payment thereof to imprisonment for a period not less than three nor exceeding twelve months and shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent that the dividends so paid shall have exceeded the profits and such amount may be recovered by the creditors or the liquidator suing on behalf of the creditors."

It has been said by the defendants that where a statute provides a special mode of procedure that mode should be followed. It appears to me that that is exactly what has been done in this case. The very course pointed out by the above section has been pursued in this action. Now when this machinery was sold the company was in debt and therefore it is idle to say that these proceeds were profits arising out of the business of the company. They were proceeds for the payment of its debts, and the directors with the knowledge of this debt due to Terrill paid these dividends. A resolution of the 20th of June says : Resolved that an interim dividend of 2s per share payable out of the proceeds of the machinery be and is hereby declared to be payable on the 28th instant. And a resolution of the 20th August says : Resolved that a final dividend of 10s. per 100 shares be and is hereby declared to be payable at the office of the company on Wednesday the 28th instant.

Neither of these dividends are paid out of the profits; on the face of it they are proceeds out of the machinery and it seems to me that this money was distributed fraudulently to defeat the creditor's claim. The English decisions to which I have been referred show the broad principle that dividends are not to be paid out of moneys not profits and if they are so paid that the directors are liable. Here we have a Statute to that effect; but whether with or without the Statute the directors are liable. It has been urged that the winding up order was bad because notice was not given within a sufficient time before the application was made. It has been sworn that a registered letter was sent; to this the manager answers that he did not receive it. I think it is utterly immaterial whether he received it or not. The Act makes the posting of the letter service. Then it appears that this letter was received by the manager's brother at the manager's office, and I do not think it an unreasonable conclusion to come to, that the manager did receive notice of the contents of that letter, and if it were necessary I should so hold. The plaintiff has succeeded in his action against the directors. The plaintiff has made the manager of the company a defendant, but there can be no relief against him, he is merely the servant of the company. If the manager had defended separately, I should have given him his

costs, but as he has not defended separately, I shall merely exclude him from the judgment. It is clear that this action is brought in the interest of Terrill, but all other creditors are equally entitled to be paid their debts as Terrill is. Judgment for the plaintiff. Order the defendants other than the manager Lempriere to pay to the plaintiff the sum of £271 15s. 8d. or so much thereof as may be necessary to enable the plaintiff to pay every creditor of the company, who has proved or shall prove within six months from this date, his debt under the liquidation, the sum so proved by him. Order the defendants other than the manager Lempriere, to pay the costs of the action.

Solicitor for the plaintiff, *Lyons and Turner.*

Solicitors for the defendant, *Gaunson and Wallace.*

Before a'Beckett, J. and a jury of six.

ASKEW V. DANBY.

Nov. 12, 13, 14, 15, 16, 20.

Bill of Sale—Registration—Instruments and Securities Statute 1864 s. 59 Act No. 557 s. 1—Instruments Act 1890 s. 133—Costs.

A document by way of absolute transfer and under which possession of the goods comprised therein is given and for which goods the purchase money has been paid is a bill of sale within the meaning of the Acts relating to bills of sale and is of no effect either at law or in equity unless it be registered, and the subsequent payment of the purchase money and the taking possession if done in pursuance of such bill of sale will not vest the property in the purchaser.

Where a trader has commenced and carried on business with the goods comprised in such a bill of sale as hereinbefore mentioned and has sold some of the goods and has added to his stock by other goods partly with the proceeds arising from the sale of the goods comprised in the bill of sale and partly on his own credit, the grantor or his representatives are not entitled to seize the goods so purchased and added to the stock, though they may be entitled to seize such of the goods included in the bill of sale as remain in the possession of the grantee.

Where a plaintiff has succeeded on some and failed on other issues raised by his action the Court will not give special directions as to the adjustment of the costs between the parties if such directions would tend to hamper the taxing officer when dealing with such costs.

This was an action for trespass and for damages for the seizure and sale of the plaintiff's goods, and for the detention of the plaintiff's trade books. The statement of claim set out that the plaintiff was a draper and carried on business at certain premises called Bradford House in Fitzroy, of which premises he was the yearly tenant, and that during the currency of such tenancy the defendant broke and entered the said premises, and seized the plaintiff's stock and sold the same and the plaintiff

claims £20,000 damages. The defendant in his defence admitted that he had seized and sold certain of the goods but alleged that they belonged to one Wilkinson who had sequestered his estate on the 7th January 1890 and of whose estate the defendant was trustee. That the goods had been sold to the plaintiff on the 24th December 1889 but that such sale was not a real but a sham sale that it was in fraud of creditors and without valuable consideration and that it was a fraudulent preference of one Burkitt. Further that the alleged sale was not made in the ordinary course of business and the document whereby the alleged sale took place was never registered as a bill of sale nor was any notice of any intention to file the same ever lodged.

Mr. Purves, Q.C., Dr. Madden, Mr. Irvine and Mr. Coldham appeared for the plaintiff.

Mr. Isaacs and Mr. Bryant appeared for the defendant.

At the close of the case the following questions were put to the jury.

1. Was the alleged sale by Wilkinson not a real but a sham sale not intended by either Wilkinson or the plaintiff to pass the property or any of it to the plaintiff.

2. Was the alleged sale made by Wilkinson, as the plaintiff knew, at a time when Wilkinson was greatly indebted and for the purpose and with the intention of defrauding defeating and delaying the creditors of Wilkinson and without any valuable consideration.

3. Was Wilkinson at the time of the alleged sale, as the plaintiff and Burkitt well knew, unable to pay his debts as they became due from his own money and was the alleged sale made in favor of plaintiff in trust for Burkitt and as Burkitt then well knew of giving Burkitt a preference over the other creditors.

4. Assuming that the plaintiff is entitled to damages for the seizure and sale of goods bought and paid for after the purchase from Wilkinson what damages do you give for the seizure of such goods.

5. Do you find that any of the goods seized by the defendant were goods which had been bought on credit and not paid for at the time of the seizure.

6. If you answer yes, to question five what damages do you give for the seizure and sale of such goods?

7. What damages do you give for the seizure of the trade books bought by the plaintiff?

8. If you answer questions one, two, and three in favor of the plaintiff what damages do you give in addition to the damages under questions four, five, six and seven?

9. Were the goods bought by the plaintiff after the sale by Wilkinson distinguishable by the defendant from those included in the sale by Wilkinson?

10. Were the goods bought by the plaintiff after the sale by Wilkinson distinguishable by the plaintiff from those included in the sale by Wilkinson?

11. Was the plaintiff offered by the defendant an opportunity for distinguishing and removing the goods so subsequently bought before the defendant sold them with the other goods?

12. Had the plaintiff's tenancy of Bradford House been determined by operation of law when the defend-

ant seized in November 1890?

13. If you say No to question twelve what damages do you give for trespass in entering Bradford House?

The jury returned the following answers. In answer to questions one, two and three we think it was a real and not a sham sale and was for valuable consideration and was not in trust for Burkitt.

In answer to question four; £1000 damages. In answer to question five; Yes. In answer to question six; £475 damages, In answer to question seven; £1 damages. In answer to question eight; £3,800 damages. In answer to question nine; No. In answer to question ten; Yes. In answer to question eleven; No. In answer to question twelve; Yes.

On these findings *Mr. Irvine* moved for judgment.

Cur. ad. vult.

Nov. 24.

MR. JUSTICE A'BECKETT.—This is an action to recover damages for the seizure and sale of plaintiff's goods, for the disturbance of the plaintiff's possession as tenant, and for the detention of his trade books. The defendant denies that the goods seized were the plaintiff's, and alleges that they belonged to one Wilkinson, who voluntarily sequestered his estate January 7, 1890, that they were sold by him to the plaintiff December 24, 1889, and that this was not a real but a sham sale, that it was in fraud of creditors, and without valuable consideration, and by way of fraudulent preference of one Burkitt. He also contends that the document under which the transaction was effected was a bill of sale, wholly invalid for want of registration. Immediately after this document was signed the plaintiff went into possession of the purchased property, consisting of the stock-in-trade of a draper. He sold largely and bought largely in the ordinary course of business until he was stopped by the seizure of the goods in March, 1890, by Wilkinson's trustee in insolvency, the father of the present defendant, who was elected as his successor in the trust, and sold that which his predecessor had seized. This consisted of the original stock and of new goods bought by Askew. As to these new goods, the defendant pleads that most, if not all, of them were bought out of the proceeds of sale of the original goods, and that if there was any not so bought, they were small in quantity, and were so mixed up with the other goods as to be indistinguishable by the defendant, and that he was always willing to return them to the plaintiff on his pointing them out. The questions raised by the pleadings were so complicated, and the rights of the parties were so different as to the different descriptions of goods seized, that I could not properly ask the jury for a general verdict for plaintiff or defendant, and I therefore sent them specific questions on all the matters of facts in issue. The question of whether the document of 24th December was a bill of sale, which required registration was a matter of law. It involved the consideration of facts, but as the evidence on the subject was all one way I did not consider it necessary to submit any question upon it to the jury. After the jury had answered the questions, I heard arguments on motion

for judgment. The most important point argued involving the plaintiff's right to the damages of £3,800, given in answer to question 8, was as to the non-registration of the bill of sale. This document is in the following words:—

Melbourne, 24th December 1889.

"In consideration of the sum of £5,325 to be paid to me as hereinafter mentioned, by George Askew, of North Fitzroy, draper, I do hereby sell, assign, and transfer to him all my stock-in-trade, goods, and fixtures, and chattels in, upon, and about my premises, known as Bradford-house, 115 George's road, North Fitzroy. Payment to be made as follows:—£500 cash; balance by approved bills in equal amounts, at one, two, three, four, five, and six months, with interest at 6 per cent.

"H. H. WILKINSON.

"Witness.—M. J. S. Gair.

"Received from Mr. Askew the sum of £500.

"H. H. WILKINSON."

24/12/90

H. H. W.

An absolute transfer, not by way of mortgage or security, is within the definition of the act. See *Swift v. Pannell*, 24 Ch. D. at p. 210; *Yarrnton v. Taylor*, 13 V. L.R., 303. An equitable assurance is within the act, *Yarrnton v. Taylor*. If a good transaction can be proved without having recourse to a document such as that of the 24th of December, the transaction will not fall because the document is not registered. See the law on this subject fully stated in *Newlove v. Shrewsbury*, 21 Q.B.D., 41, and lately acted on by this court in *Young and Others v. Mook Ah Meng*, 12 A.L.T., 206. In the present case there was no transaction without the document. No binding bargain was entered into. The parties were in doubt if any sale could be made, until they went to the solicitor, who reduced into writing the agreement which Wilkinson signed. The plaintiff says in his cross-examination, "There was no formal arrangement until the document was signed, that is the document under which I claim." None of the evidence is in conflict with this statement. Without this signed document there would have been no transaction between the parties. The subsequent taking possession was under authority derived from it. I have, therefore, no doubt that, according to the authority of cases in our own and in the English courts, this document required registration. It has, however, been argued that, though it may have required registration, the omission to register is immaterial, inasmuch as the goods did not remain in the apparent ownership of the vendor, and that the only consequences of non-registration are those described in the words, "Otherwise &c." in section 59 of Act 204. The defendant's contention is that the words of section 1 of Act 557. "No bill of sale shall be operative or have any validity at law or in equity until filed," make the document void to all intents and purposes, notwithstanding that possession under it was taken before the insolvency of the grantor. I have had occasion to consider this point before, and my

views on it are expressed in the case of *M'Carthy v. Nicholls*, 8 A.L.T., p. 180. I agree with the defendant's contention. This construction may occasion inconvenience and hardship, but it does not involve any more trenchant curtailment of the rights of ownership than was directly aimed at and accomplished by Act No. 557. By this an owner of chattels was deprived of the right to mortgage them if any creditor objected to his doing so, and it is little more to say that he shall not transfer them by written instrument out of the ordinary course of business if any creditor objects to his doing so. Whatever may be thought of the result of my interpretation of section 1, it seems to me inevitable from the language used. As against this construction it may be said that the words "Otherwise, &c.," retained in section 133 of the Consolidating Act are thereby reduced to surplusage should have been omitted, and are misleading, but I think that their retention cannot be considered as a legislative declaration of the law upon a point left doubtful when the acts consolidated were in force. As against my construction, in addition to the case referred to in my previous decision, *Pearl v. Richardson*, 8 A.L.T., 63, might be cited, and there are observations in *Yarrnton v. Taylor* which seem to treat apparent ownership as still material. The question raised in argument is important, and I would have reserved it for the Full Court if I had not already given effect to my views in a previous case. I hold the bill of sale void at law and in equity for want of registration, notwithstanding that possession was taken directly after it was signed. I hold that the plaintiff had no right to the goods sold to him unless derived from the bill of sale, and therefore that the plaintiff is not entitled to the £3800 damages given for seizure of these goods. As to the damages of £1000 given in answer to question 4, the defendant contends that, inasmuch as these goods were bought with the proceeds of the sale of the goods comprised in the bill of sale, they became the defendant's goods, citing in support of this contention *Hallett's case*, 13 Ch. D. p. 696. The facts were that all moneys received in the business were paid into the plaintiff's bank account, whether they were the price of old goods or of new goods, and whether of new goods bought for cash or on credit, and that new goods were paid for by cheques on this account. There was a seizure on the 7th of January, but the officer of the trustee was turned out, and the plaintiff's possession was resumed and continued until March, and during all this time selling and buying went on. It is admitted that the bill of sale gave leave and license to sell until revoked by the seizure on the 7th January. Up to this date at least the plaintiff had full right to receive proceeds and do what he liked with them. As the jury have found the transaction honest, I think no fiduciary character in relation to the defendant within the principle of *Hallett's case* or of *Taylor v. Plumer* 3 M. & S. 562 can be attached to plaintiff's receipt of proceeds after the sale. Part of the money employed in the purchase of new goods may have been the price of goods bought on credit, as to which the trustee could claim no right. The purchase money of

new goods cannot be attributed exclusively to the proceeds of goods to which the defendant was entitled. I think that the defendant could not lawfully treat as his the goods bought by the plaintiff. The seizure was not an act which should incline the Court to strain equitable doctrines to help the defendant out of a difficulty. It was an assertion of legal title without any regard to equities. Instead of bringing an action to set aside the sale, to have accounts taken, and offering to account for purchase money received—in which action a receiver might have been appointed—the trustee, who had received part of the price, seized and sold all the goods which he could lay his hands on, and did nothing to adjust the rights which arose on the sale being set aside. He forcibly asserted his legal rights, and the Court ought not to give him more than his clear legal rights in this action, in which the equities between the parties as to accounts of proceeds received and as to purchase money paid cannot be settled. I hold the plaintiff entitled to the damages of £1,000 under the answer to question 4. As to the damages of £475 under the answer to question 6 there has been little discussion. The plaintiff is clearly entitled to these damages on the jury's findings. As to the books I order the defendant to return the books which were purchased by the plaintiff within one month from this date, and I reserve liberty to either party to apply as to such books; or if plaintiff prefers it I shall make no order for return, and add £1 to his general damages. As to costs, I think it is difficult to apply rules 1 and 2 of order LXV. The event has been decided in favour of the plaintiff, but he fails as to part of the goods in respect of which the action has been brought. He also fails in the issue of law raised as to bill of sale. He also fails to make out any case of disturbance of tenancy. According to the decision of the Full Court in *Slater v. Shire of Colac*, 11th of July, 1891, the Court ought not to anticipate the difficulties which the taxing officer will have to deal with by giving any special direction to remove them. The only costs to which I think the defendant properly entitled are such as are distinctly attributable to the assertion and attempted proof of tenancy of Bradford-house, and to the claim in respect of the goods comprised in the bill of sale as distinguished from the other goods seized, but I think that on this second head no costs exclusively attributable to the claim to such goods could be found. To enable the defendant to make what he can of the successes to which I have referred I shall follow the course prescribed by *Slater v. Shire of Colac*. I give judgment for plaintiff for £1475, with costs of the action, except the costs of the issues on which the defendant has succeeded, plaintiff to pay the defendant the costs of such issues. Direct defendant within one month from this date to deliver to the plaintiff the books purchased by him after the 24th December, 1889. Liberty to either party to apply as to such books.

Solicitors for the plaintiff, *Brahe and Gair*.

Solicitors for the defendant, *Braham and Pirani*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., a'Beckett and Hood, J.J.)

Re STREET AND CO. ex parte PARSONS.

Oct. 21, 22, Dec. 10.

Company—Paid up shares—Contributory.

In the absence of special statutory provision, the liability of the shareholder to contribution in the case of liquidation of a company depends on the terms of the contract, as based upon the statutory documents which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other. The contract as it exists at the time of winding up is the sole measure of liability and the Court cannot expand the contract nor fix upon the party a new engagement larger or other than that into which he has entered.

Appeal from Hodges J.

The facts and arguments appear in the judgment.

Mr. Higgins and *Mr. Bryant* appeared for the appellant.

Dr. Madden and *Mr. Mitchell* appeared for the respondent.

HIGINBOTHAM C.J.—In the Matter of the Companies Act 1890 and of Street and Co. Limited and Charles Robert Parsons.—This is an appeal by the liquidator from the decision of Hodges, J., by which on settlement of the list of contributories of the company (Street and Co.), Charles Robert Parson was ordered to be removed from the list in respect of 4,000 shares. The appellant asks that this order may be reversed, and that Mr. Parsons may be placed on the list of contributories as the holder of 5,000 shares. Mr. Parsons admitted his liability to be placed on the list of contributories for 1,000 shares in respect of which his name appears on the register. He denied his liability for 4000 additional shares in respect of which also his income appears on the register and for which a scrip certificate was issued, on the ground that they were part of 16,000 fully paid up shares referred to in the fourth paragraph of the memorandum of association, which is in the following terms:—

“The capital of the company is £50,000 in 50,000 shares of £1 each, 34,000 of which are contributing shares and 16,000 fully paid up and upon which no calls shall be payable.”

It appears from the affidavit and the evidence of Mr. Parsons that he was a subscriber of the memorandum of association for 1,000 contributing shares, and that he was a director of the company from the time of its formation. He stated that though his name appeared in the register-book in respect of 4,000 fully paid up shares, he never made application for them, nor did he receive any notice whatsoever that the same had been allotted to him. He was unable to say under what circumstances, or for what reason, his name had been placed on the register. He was

first aware that his name was on the register in respect of these 4,000 shares about February, 1889, when his scrip certificate was handed over to him. But he did not then make any enquiries, nor did he take any steps in reference to the matter, as the company was then practically in process of voluntary liquidation, and he assumed that as the shares were paid up there could be no liability in respect of them, and he knew there was no prospect whatever of there being any surplus of assets over liabilities. Neither he nor anyone else paid anything in respect of these 4,000 shares. The learned judge assumed, for the purpose of his judgment, that Mr. Parsons had agreed to take and had taken the 4,000 paid-up shares, and he held that if the contract was a valid one, Mr. Parsons, as a shareholder, was under no liability, and could not be ranked as a contributory in respect of those shares. We are of opinion that this decision was correct. The proceeding in which it was given was not one to rescind the contract between the shareholder and the company or to remove the name of the shareholder from the register on the ground of fraud or want of consideration given for these 4,000 shares. On the contrary, the liquidator, by proposing to place Mr. Parsons on the list of contributories in respect of these shares, affirms the contract, and he seeks to add a term to it in direct contravention of an express provision of the contract as fixed by the memorandum of association with respect to shares denominated "fully paid-up shares." In this view it has been argued for the appellant that the latter words of clause iv. of the memorandum of association, by which it is provided that no call shall be payable on fully paid-up shares, is either nugatory or *ultra vires*, and that power cannot be taken by the memorandum of association to exempt a shareholder from liability to contribution in respect of shares on which the full amount has not been, in fact, paid. The words appear to us to have little more effect than to explain and confirm the real meaning of the words "fully paid-up" immediately preceding. Whether the words be taken together or separately the meaning of the latter provision of this clause clearly is that 16,000 shares of the company shall be and are considered to be fully paid up, and shall not be contributing shares. This provision is not repugnant to any of the objects mentioned in the preceding part of the memorandum, and it is not, therefore, *ultra vires* within the opinion of M'Naghten, J., in *Trevor v. Wentworth*, (12 Ap. Ca, 436). Nor is there anything in Division I. of the Victorian Companies Act 1890 which forbids the issue of fully paid-up shares or enacts that shares of this denomination which may have not been in fact fully paid up may be treated as shares upon which calls shall be payable. Section 25 of the English Companies Act 1867, which provides that every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies on or

before the issue of such shares, has not been adopted in Victorian legislation. Some of the authorities which have been cited in support of the appeal are cases which have been decided upon this section. They have no application to shares in trading companies under the Victorian law. Several of the other cases referred to in argument are cases where the memorandum of association did not provide for paid-up shares; and some related to the liability of the shareholder to contribute as the holder of shares issued at a discount. No English authority has been mentioned in the argument in which the existing agreement between a registered shareholder and the company in conformity with the terms authorised by the memorandum of association has been altered, and a liability not created by the agreement has been attached to the shareholder by a court of equity. On the other hand, the authorities are numerous and uniform that in the absence of special statutory provision the liability of the shareholder to contribution in the case of liquidation depends on the terms of the contract, as based upon the statutory documents which are registered for the purpose of protecting the shareholders on the one hand and the creditors on the other. The contract as it exists at the time of winding-up is the sole measure of liability, and the Court cannot expand the contract nor fix upon the party a new engagement larger or other than that into which he has entered. *Waterhouse v. Jamieson*, (L. R. 2 H. L., acc. 29). In *Currie's case* (3 De Gex. J and S) Turner, L. J., said at page 371 :—

"Fraud, assuming there was fraud, would of course warrant the Court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorise any Court to substitute other terms."

In the cases of *Carling, Hespeler, and Walsh* (1 Ch. Div., 124) James, L. J., said :—

"If, therefore, the case depends on a contract between them (i.e. persons then before the Court) and the company, the contract must either be approbated or reprobated. If the contract was a contract that they would take paid-up shares we cannot convert that into a contract to take unpaid shares." In *Anderson's case* (7 Ch. Div., 95) Jessel, M.R., observed :—

"You cannot alter the contract to such an extent as to say though you have bargained for paid-up shares, we will change that into a bargain to take up shares not paid up, and put you on the list of contributories on that ground."

Without expressing an opinion as to whether the facts disclosed in this case may not entitle the company to relief in some other form of proceeding, we think that the application of the liquidator to place this shareholder on the list of contributories is an application which cannot be granted by the Court, and that the learned judge was right in ordering Mr. Parsons' name to be removed from the list. The appeal will be dismissed with costs.

Solicitors, *Hopkins* for plaintiff company; *Hart* for *Samuels* for defendant Parsons.

(Before a'Beckett, Hodges, and Hood, J.J.)

CURTISS AND HARVEY v. MESSNER.

Oct. 1, 2, Dec. 15.

Trade name—Infringement of—Fraud.

It is no answer to an application to restrain by injunction the repetition of acts tantamount to an infringement of a trade name that the defendant did not know that in doing them he was appropriating or using a name which was the plaintiffs' property. The ground of jurisdiction in cases of this kind is the protection of the plaintiffs' property not the fraud of the defendant.

Appeal from Higinbotham, C.J.

The action had been instituted by Curtiss and Harvey against Frederick Messner. The plaintiffs were a firm of persons who and whose predecessors had carried on in England for over 60 years the business of manufacturers of gunpowder and in particular of a sporting gunpowder which had been called "Diamond" or "Diamond Grain" powder. For more than 30 years the plaintiffs had by their agents sold in Victoria as well as in other Australasian colonies the said powder in great quantities under the said name and bearing the device of a diamond. It was also stated in the statement of claim and admitted in the defence that the said name had become the plaintiffs' property as applied to gunpowder. It was alleged in the statement of claim that the plaintiffs had recently discovered that the defendant was selling gunpowder not manufactured by the plaintiffs under the names of "Diamond" and "Diamond Grain" sporting powder in boxes bearing the device of a diamond. It was further alleged by the plaintiffs that the defendant, in selling the gunpowder under the name and in the manner aforesaid, was doing so fraudulently, and that the plaintiffs' sole right to the use of the word "Diamond" as applied to gunpowder was thereby infringed. The defendant (*inter alia*) admitted, in his defence that he had, on one occasion, sold sporting gunpowder, not the manufacture of the plaintiffs, as diamond grain gunpowder but he denied that he had done so fraudulently. The plaintiffs claimed the usual injunctions, accounts of the profits, etc., and delivery up of labels, etc. Higinbotham, C.J., in giving judgment in the court below, found that the defendant had not acted fraudulently and had not infringed the plaintiffs' sole right to the use of the word "Diamond" as applied to gunpowder; he gave judgment for the defendant. From this decision the plaintiffs now appealed.

Mr. Higgins and Mr. Bryant appeared for the plaintiffs.

Mr. Isaacs and Mr. Weigall appeared for the defendant.

Cur. adv. vult.

The judgment of the Court was delivered by A'BECKETT J.:—We see no reason to question the decision under appeal as to that part of the plaintiffs' case which deals with the alleged fraudulent use of imitative labels. The main subject of discussion before us, and that with which the decision does not deal distinctly is another part of the case as to the right of property in the name "diamond grain" alleged in paragraph 2 of the statement of claim, and admitted by the defence with the qualification that "the term diamond grain gunpowder is used by many persons in Victoria as meaning sporting gunpowder of the best

quality, and not necessarily gunpowder made by the plaintiffs." We have to determine whether the right of property thus admitted has been invaded by the defendant. The evidence in support of the charge is to be found in the cross-examination of the defendant who said, "I have never sold powder as 'diamond' or 'diamond grain.' People have asked for powder under that name. I did not like to have another name put on my powder. M'Fee and also Abrahams have asked me for 'diamond grain.' I answered them, I have 'diamond grain,' and I then sold them prime sporting powder." In examination he says, in reference to the sale to Dyer, the informer, "At time of sale I honestly believed that 'diamond grain' represented prime sporting powder, that the terms were identical." The document which the defendant gave to Dyer described the defendant's powder as "diamond grain." From this evidence it is clear that the defendant did not regard the words diamond grain as specially descriptive of the plaintiffs' powder, and that if before this action a customer had asked for diamond grain powder the defendant would have supplied his own. The plaintiffs contend that supplying defendant's powder when so asked for is equivalent to a representation by the defendant that the powder which he sells is diamond grain. Assuming as the admission in the defence entitles us to assume that the words diamond grain denote, that excellence of quality, for which the plaintiffs' powder gained its reputation, persons using those words, though not knowing the plaintiffs' names in connection with the plaintiffs' powder, do, in fact, intend to describe the powder which the plaintiffs manufacture. If they ask for diamond grain and are supplied with the defendant's powder they do not get what they intend to get. The plaintiffs are deprived of intending customers. Not only do they sustain direct loss in this respect, but they are injuriously affected by a course of dealing under which their distinctive name, in which they have a proprietary right, will gradually cease to distinguish, and become what the cases describe as *publici juris*. It is no sufficient answer to an application to restrain by injunction the repetition he acts similar to those which the defendant has done that the defendant did not know that in doing them of was appropriating or using a name which was the plaintiffs' property. The ground of jurisdiction in cases of this kind is the protection of the plaintiffs' property, not the fraud of the defendant. Assuming that the defendant acted without any fraudulent intention, his acts were none the less injurious to the plaintiffs, and the plaintiffs are none the less entitled to protection against them. We think that, as to this branch of the case, the plaintiff is entitled to succeed, and that the appeal to that extent should be allowed, and an injunction be granted in the terms sought, but without costs, as the defendant succeeds on the other branch. Appeal allowed, without costs. Judgment entered for defendant to be set aside. Judgment to be entered for plaintiffs, without costs—ordering that defendant, his agents, servants and employes be restrained from selling or delivering or consuming or permitting to be sold or delivered any gunpowder not

of the plaintiffs' manufacture under the name of "diamond" or "diamond grain."

Solicitors for plaintiffs, *Braham and Pirani*; for defendant, *Eggleston, Derham and Martin*.

SUPREME COURT SITTINGS.

(Before Hood J.)

AUSTRALIAN MORTGAGE AND FINANCE CO. v. GUTHRIDGE.

September.

Promissory note. Proper person and proper time to affix and cancel the stamp. Stamps Act 1890 s. 68, 76, 77, 87.

The proper person to affix and cancel the stamp on a promissory note is the maker, and the proper time to affix and cancel such stamp is when the note is made and before it is issued and this is so even though the promissory note be post-dated.

The words "duly cancelled" in s. 87, sub-sec. 4 of the Stamps Act 1890 mean a defacement that will make it impossible that the stamp shall be used by any other person, at any other time or for any other instrument.

Where a promissory note comes into the hands of a holder at a date prior to the date appearing on the stamp such stamp cannot purport or appear to be duly cancelled within the meaning of s. 87 subsec. 4, and even though such holder be a bona fide holder he cannot recover on the note in an action against the maker.

A bona fide holder of a promissory note not duly stamped is only protected if when he receives the note the stamp upon it is sufficient in amount and on the stamp appear a name or initials which may be those of the proper person and a date which may be the proper date.

This was an action by the endorsees and holders of a promissory note against the maker of the note.

Mr. Mitchell and Mr. Coldham for the plaintiffs.

Mr. MacArthur for the defendant.

At the conclusion of the trial His Honour found the following facts viz.; that the note was signed by the defendant, that the note reached the plaintiffs' hands in the same condition as it now is, that the plaintiffs had given valuable consideration for it, that the stamp was put on at the proper time, before the date of the note if that is the proper time, and that it was stamped before its due date. The remaining facts appear in the judgment. On these findings counsel for the plaintiffs on a subsequent date moved for judgment.

November 30th.

Mr. Mitchell for the plaintiffs moved for judgment. The sections to be considered are s.s. 76, 77 and 87 (iv) of the Stamps Act 1890. In this case as it has been found as a fact that the plaintiffs are bona fide holders, I submit that they come under the prov. so in s. 87 (iv). "Effectually obliterated" means so that it cannot be used again. When the plaintiffs got this

note it purported to be cancelled on the date on which it would begin to run. The maker writes his name and intimates that the document is not to take effect until a future date. [Hood, J. But the Act says that he is to date it as of the date on which he writes his name.] I would refer the court to Bagley Bros. and Co. v. Ellison, 16 V.L.R. 263. [Hood, J. That case is not this; here to any one obtaining the note before the 20th of September it would not appear to be duly cancelled]. In a post dated instrument I submit that the stamp is properly affixed if it is put on at any time before the document is issued. There is no definition in the Act as to what is the proper time to cancel. [Hood, J. Except in s. 87]. I admit that the proper time to cancel the stamp on a document which is not post-dated is before it is issued. In Goldberg v. Devlin 12 V.L.R. 795 the court intimated that the proper time was when the document was executed. Here the note was delivered as a sort of escrow it was not issued then within the meaning of s. 3 of the Instruments Act 1890. As there is no definition given in the Act of the proper time all that is required is that the revenue be protected. [Hood, J. If that be so the stamp might be put on at any time before the note is paid].

Mr. MacArthur for the defendant. We have to look at s.s. 76, 77, 84 (3a) and 87 (4). [Hood, J. With all respect to the Legislature it seems to me that s. 77 subsec. 1 is all ultra vires]. The stamp must be cancelled by the proper person and must bear the date of the cancellation. S. 87 subsec. 4 says "Effectually obliterated," and looking at s. 77 that means so that it may not be used again on any other instrument. This stamp might have been used again. The debt represented by the note might have been paid between the 15th and 20th September in which event there is nothing to prevent this stamp being used again. The date of the note and the stamp need not be the same, that is shewn by Bagley v. Ellison 16 V.L.R. 263, Whitty v. Dunning, 6 V.L.R. (L.) 324, Harriman v. Purches 9 V.L.R. (L.) at p. 238, Goldberg v. Devlin, 12 V.L.R. 795.

[Hood, J. What do you say as to the proper time] Goldberg v. Devlin, 12 V.L.R. 795 shows that the proper time to cancel is the time when the document is executed. The proper time for affixing is the proper time to cancel.

Cur. ad. vult.

December 7th

MR. JUSTICE HOOD.—This is an action on a promissory-note, dated 20th September, 1890, brought by the plaintiffs as endorsees and holders against the defendant as maker. Several defences were raised at the trial, but they were all then disposed of against the defendant, except one arising under the Stamps Act 1890, with which I have now to deal. The facts relating to this defence are as follow:—In 1890 one Robert Clark, trading as R. Clark and Co., had dealings with the defendant, and obtained from him a promissory-note for value, falling due on the 20th September, 1890. This note Clark discounted with the plaintiffs. In September, 1890, some short time

before this note became due, Clark obtained from the defendant the note now sued upon, which was intended to be a renewal of the one then current, and this note was forwarded to the plaintiffs on the 15th September, 1890. When received by the plaintiffs the note had affixed proper adhesive stamps of sufficient amount, cancelled by having written across them "R.G." and "20/9/90." The evidence with regard to the affixing and cancellation of these stamps was extremely unsatisfactory but it was certain that they were not affixed by the defendant, nor were the figures representing the date in his writing. It appeared that the defendant handed the document unstamped to Clark, who gave it in the same condition to one of his employes, who made in his book the usual entries about the note. It was next seen a few days after by Clark's accountant when the stamps were on, with the initials across, but there is no evidence as to when or by whom this was done. The accountant then put the figures on the stamps, and sent the document to the plaintiffs. Under these circumstances it was objected for the defendant that this promissory-note was not "duly stamped" within section 68 of the Stamps Act 1890. The expression, "duly stamped," is defined by section 77, and two modes of proof are provided for satisfying the Act. The first alternative is that the proper person should cancel the stamp by writing thereon his name or initials, together with the true date of his so writing. Under this requirement the note was clearly bad, because the proper person to affix the stamp and cancel it was the defendant as maker, and it should have been done when he made the note. It was, however, contended for the plaintiffs that they are entitled to recover under the second alternative of the same section 77, as they alleged that they had otherwise proved that the stamps were affixed at the proper time. It is plain than in an ordinary case this argument would fail, because the proper time to affix the stamp was when the note was made by the defendant and before it was issued to Clark. But it was urged that this note was delivered to Clark in some way was an *escrow*, or conditionally, and also that as the note was to be used to renew one falling due on the 20th September it was properly post-dated as of that date, and accordingly the date on the stamps should agree with the date of the note. I cannot accept this view. The note was delivered to Clark absolutely, to be made use of by him in the ordinary way, and without any condition attached. The intention clearly was that this note should pass to Clark in order that he might take up the one coming due, or, in other words, the defendant made and issued this note to Clark unstamped. The stamps, therefore, were affixed and cancelled after issue, and by the wrong person, and I cannot see how the fact that the note was post-dated can alter the effect of sections 76, 77, and 87, which require the drawer to cancel the stamp and at the time when he first makes the note and to place thereon the *true date* of his so writing. In my opinion, therefore, this note was not "duly stamped" under either alternative provided by section 77. "But assuming this to be so, the plain-

tiffs then argued that they are covered by section 87, sub-section 4, which protects *bona fide* holders of promissory notes if when the documents are received there are affixed thereto the proper stamps "effectually obliterated and purporting and appearing to be duly cancelled." If the words "duly cancelled" mean cancelled in the way mentioned in section 77, this note did not "purport or appear" correct when the plaintiffs received it. It came to their hands on the 15th September and the stamps appear to have been cancelled on the 20th. This could not possibly have been the "true date" as required by section 77, and in this view the plaintiffs would fail. But it was said that the Legislature in sub-section 4, has used an expression "duly cancelled" different to that previously used, and therefore something different is meant, and that any form of cancellation is sufficient. No definition is given of due cancellation in the Act, but sub-section 2 of section 77 imposes a penalty on any person who being required by law to cancel a stamp does not do so duly and effectually in the manner provided by the preceding sub-section, viz., by writing thereon his name or initials and the true date of his so writing. And the object of this mode of cancellation can be gathered by reference to section 77, subsection 1. It is there provided that the writing on the stamp is to be so done "that the stamp may be effectually cancelled and rendered incapable of being used for any other instrument." This is, I think, what is meant by "duly cancelled," and the intention is to compel in every case such defacement as will make it impossible that the stamp shall be used by any other person at any other time or for any other instrument. Therefore, in my opinion, the holder of a promissory note not duly stamped is only protected if, when he receives the document, the stamp upon it is sufficient in amount, and on the stamp appear a name or initials which may be those of the proper person and a date which may be the proper time. The stamp then would purport and appear to be "duly cancelled," and the holder could recover although it were afterwards proved that the stamp had not been affixed or cancelled at the right time or by the right person. This view is, I think, supported by *Whitty v. Dunning* (6 V.L.R. (L), 324), *Goldberg v. Devlin* (12 V.L.R. 795), and *Marc v. Rouy* (31 L.T., N.S., 372); indeed, in the last case the point appears to be conceded all round. In the present instance when the note reached the plaintiffs on 15th September the stamps could not have purported or appeared to have been duly cancelled in this sense, as they bore a subsequent date, and I therefore feel constrained to give effect to this objection. There will be judgment for the defendant with costs, but the plaintiffs will have the costs of the issues upon which they succeeded to be set off.

Solicitors for the plaintiffs, *Mulleson, England, & Stewart*; Solicitors for the defendant, *Farmer for Dickinson*.

Before Hodges J.

MITCHELL & Co. v. JOSHUA BROS.

Nov. 24, 25, 30, DEC. 1

Trade Mark Infringement—Fraudulent imitation.

A device containing a large number of elements which are common to the trade, and so publici juris may, if it also contain certain distinctive elements peculiar to itself, be registered as a trade mark.

A person using only such parts of such device as are common to the trade, will not be liable to an action for infringement of trade mark, but if he use them in such a manner as to show a clear intention to profit by the reputation of the article bearing such device, and if in fact such use is calculated to mislead purchasers, he will be liable for fraudulent imitation of such device, and may be restrained from using such parts of such device.

This was an action by the plaintiffs, who are distillers and wine and spirit merchants of Belfast, Ireland, and who carry on a large agency business in Victoria, against the defendants, who are also distillers carrying on business in South Melbourne, for infringement of their registered trade mark, and for fraudulently imitating the plaintiffs' bottles and labels with the intention of profiting by the reputation obtained in this colony by the plaintiffs' whisky. And the plaintiffs claimed an injunction restraining the defendants from using the label complained of, an account of the profits made by the defendants since they began to use such label, or £1000 damages, and delivery up of all such labels to be cancelled. The defence was that the alleged trade mark was *publici juris* and a denial of the fraud.

The plaintiffs' trade mark, which was registered in May 1882, is described as "a label, across the centre of which is a tablet bearing the words 'Old Irish Whisky.' Above and resting on the tablet is a crown, and on the arched ribbon at the top is the word 'Mitchell's.' Beneath this tablet is a shield bearing a monogram composed of the letters 'M. & Co.' with the representation of a rose, thistle and shamrock underneath. Below this again is the word 'Belfast' on another ribbon, the whole being surrounded by a floral border composed of the rose, thistle and shamrock." The tablet and ribbons on this label were in colour, the bordering green, and the general background bluish, and the bottles used by the plaintiffs were imperial quart bottles. The defendants until recently did not use a quart bottle and the label used by them was a label with a white ground bearing the device of a lion rampant, red in colour, and attached to the label was their own name. Latterly, however, the defendants took to bottling their whisky in bottles closely resembling the imperial quart bottles used by the plaintiffs and they also changed their label to the label complained of which bears a very striking resemblance to that used by the plaintiffs as the size, shape, coloring and floral device are almost identical. On a tablet, which is red, across the centre of the label are

the words "Old Irish Blend" above the tablet is a crown and above that again is the word "Whisky" on a red ribbon, while below the tablet is a monogram composed of the letters "O.I.B." the whole being surrounded by a floral border composed of the rose, thistle and shamrock. The defendants name does not appear on the bottle.

Dr. Madden and Mr. Higgins appeared for the plaintiffs.

Mr. Mitchell and Mr. Weigall appeared for the defendants.

Mr. Mitchell for the defendants: Where it has been shewn that a number of other persons have been using labels very similar to those used by the plaintiff and defendant it requires very stringent proof on the plaintiffs part to establish the case that it is his trade mark that has been infringed. As to the shape of the bottles it has been shewn that a large number of persons who deal in Irish whisky have used this shape for years. The plaintiffs' trade mark has been in common use for years by all vendors of Irish whiskey and is not capable of registration *Baker v. Rawson* 45 Ch. D. 519; *Woolf v. Alsop*, 12 V.L.R. 421, 887; *Wolstenholm v. Woolhouse* 14 V.L.R. 963.

Mr. Higgins in reply: *Baker v. Rawson* merely decides that the Court has power to expunge a trade mark from the register after it has been registered five years. *Sebastian*, 2nd. edition, p. 45 *In re Wragg's trade mark* 29 Ch. D. 551. As to the significance of the word distinctive *Sebastian* 2nd edition pp. 22, 45. It will be necessary for the Court to find in order to support the defendants' view that this device was in common use before we registered and to prove that this device was and is in common use lies on the defendants and they have not shewn it. "Common use" means use by a large number of persons in the trade. Where there is no "common use" registration is conclusive. [Hodges, J. Assume that I arrive at the conclusion that a large part of the plaintiffs' trade mark was and is in common use is the whole trade mark invalid?] I should say not, we are entitled to use that part which is commonly used by vendors of Irish whisky and we have no power given us by the Act to disclaim that portion but the remainder of our label is distinctive enough. The question is have the defendants taken a substantial part of our label. Apart from the evidence of fraud against us specially there is evidence by the defendants' own admission that he defrauded the public and as the plaintiffs are one of the public as well as the vendors, the plaintiffs have been defrauded.

Mr. Mitchell, *In re Read & Grewell's design* 42 Ch. D. 260 is not an authority as to what is public use. The term "distinctive" means something that is not in common use. *Sebastian* 3rd Edition p p. 46, 47, 383.

Mr. JUSTICE HODGES. The plaintiffs in this case claim two things—first, for an infringement of their label for whisky, which was on the 22nd of May 1882 registered under the *Trade Marks Statute* 1876, and they charge the defendants with infringing their rights in respect of such trade mark by using on

bottles of whisky made by the defendants imitations or colourable imitations of his trade label and by selling the whisky so labelled. The plaintiffs also charge defendants with having fraudulently and with intent to profit by the reputation of the plaintiffs' whisky in the market used bottles of such kind and shape and so labelled as to represent to the public that the defendants' whisky was the whiskey of the plaintiff company, and thereby mislead the public. The label in respect of which the plaintiffs claim, was registered on the 22nd of May 1882 by Messrs W. E. and D. Mitchell and the defendants challenge the assignment of his trade mark to the plaintiffs. They have not addressed any argument in support of their contention and the plaintiffs appear to me to have substantiated this part of their claim by the evidence of Mr. Mitchell taken on commission. And there is a case *Shipwright v. Clements* reported in 19 W. R. 599 which seems to show that a trade mark is accessory to the good will and passes with the purchase of the good will though the trade mark is not specifically mentioned in the sale.

The next matter on which the defendants rely is that the plaintiffs' trade mark is not a trade mark at all and ought never to have been registered. In my opinion, looking at the plaintiffs' trade mark apart from the evidence of user of similar labels at the date of the registration, plaintiffs' label is a distinctive device within the meaning of the *Trade Marks Statute*. It is a picture (and a trade mark is not, as observed by Lord Justice Brett, an essay or a treatise or a poem, but a picture), and I think the plaintiffs' label is a distinctive picture which would serve to convey to an intending purchaser of whisky that particular brand, and would intimate to him the means of getting the same whisky on a future occasion by getting a bottle with the same brand upon it. But the defendants say that although that be so, there was at the time this label was registered a common user by vendors of Irish whisky of a large number of the parts which go to make up the plaintiffs' trade mark; and the defendants contend that that being so, they are entitled notwithstanding the five years' registration to dispute the validity of the plaintiffs' trade mark. I think, on the authority of *Woolf v. Alsop*, 12 V.L.R. 421, the defendants' contention, in point of law, is correct, and I think that I should follow the decision of the Chief Justice in that case on that question, and that leads me to consider whether the facts bear out the defendants' contention on that subject. A good deal of evidence was given by different persons as to the characteristics of Irish labels. To deal with the persons particularly mentioned, it appears that not only before the registration of the plaintiffs' trade mark, but for long before the plaintiffs' whisky came into the Victorian market, a firm called Dunville and Co. were importing into this colony Irish whisky, and Dunville and Co.'s label undoubtedly bears many of the characteristics of the plaintiffs' label. It is surrounded by a floral wreath composed of the rose, the thistle, and the shamrock, it has a central tablet, it has the two ribbons or scrolls upon it which the

plaintiffs' also has. That whisky was sold at that time in this market, and at the early portion of the firm's existence here largely sold, and it has been in this market from that time to the present. Then there was the firm of Fogarty, Doyle, and Co., formerly the firm of Fogarty, Daly, and Co. That firm has also used a label bearing a floral device composed of the rose, the thistle, and the shamrock. It also used the central red tablet and also the scroll at the top, though in some other respects it differs. Subsequently the firm of Fogarty and Daly dissolved partnership, and Daly carried on business on his own account, and he used a label somewhat similar to that used by his old firm, and though the sale of his whisky was not and is not very great, still he was using this label in the Victorian market at the time the plaintiffs' trade mark was registered, and for a long time previously. The same observation may be made with regard to Wise's, and I think it would be impossible for plaintiffs to sustain on that evidence the case which they attempted to make out—that so far as the floral wreath, &c., was concerned, it was a special or distinctive device. But while I think that is so, and while I think that the defendants may be entitled to the use of these matters which I have referred to, it does not prevent the plaintiffs from having a valid trade mark, if in connection with these matters common to the trade it had sufficient others, which, as a whole, make it a distinctive label, and I think the plaintiffs' label, with their name, with their monogram, with their crown on it, coupled with the relation of each part to all the other parts and the size of each part as compared with other parts is a distinctive device which they were entitled to register. If they had power under our Act as under the English Act to disclaim certain portions they might have disclaimed such portions as are not peculiarly distinctive. I therefore see no reason to decide against the validity of the plaintiffs' trade mark. The next question is, have the defendants infringed it by taking any of these portions which are common or were common to a number of labels used by other persons in the trade at the time when this trade mark was registered. They have the floral wreath, composed of the rose, the shamrock, and the thistle, they have the central tablet, they have the ribbon at the top, they have a monogram below the tablet—though a different monogram from that of the plaintiffs. These, I think, they were entitled to have, and I may say with regard to the remainder of their label they were entitled to put "Whisky" and "Old Irish blend" on it. I am not able to think that there has been a breach of the registered trade mark and so far as any claim is based on the infringement, I think I ought to find on that issue for the defendants. Then comes the plaintiffs' second question, that they have a right to recover because the defendants put that label there fraudulently. It appears that the plaintiffs' whisky has had a very good reputation in the Victorian market, and is by the Victorian public highly esteemed, and at the time the defendants began manufacturing and selling, the plaintiffs' whisky was, I believe,

on the evidence, the most highly prized of all Irish whiskies imported into this market. No witness was called by the other side to dispute that it was the most popular whisky in Victoria. The defendants began to manufacture whisky about five years ago; a year or so afterwards they began to market it and they started to manufacture under their own name with the idea of getting it into favour in the market. It appears that soon afterwards the defendants' travellers informed the defendants that there was a prejudice against Victorian-manufactured whisky, and that it was so strong that the publicans who sold it got into disrepute for selling it; that the defendants' name on it stamped it at once as a Victorian product, and that with their name on the bottle the publicans would not take it for sale to their customers. They were informed, so the defendants say, that this was not on account of any prejudice against themselves or their name, but entirely because they were known as Victorian manufacturers of the article. The defendants' travellers told them that they could sell this whisky if they put an Irish label upon it, and the defendants yielded to the suggestion, and determined to put on their whisky an Irish label. With a view to do that, the defendants had the labels used by Fogarty, Doyle and Co., and also what are called Mitchell's permitted labels placed before them, and with these before them they gave instructions to Troedel and Co. to manufacture a label which would contain all the common characteristics of the Irish label. The label produced by that firm was the one complained of in the action. Now I take it as admitted by the defendants by their own words that it was their express intention to deceive the public who were purchasers of their whisky into believing that they were getting what was not a Victorian manufactured article, and only so far as they succeeded in that deception was the label of any use. When the defendants admit so much that they were ready to practice this fraud upon the public, I infer that they would with equally little hesitation practice a fraud upon the plaintiffs, and although they say that they did not see the label which is the plaintiffs' trade mark I have some difficulty, in fact, I cannot believe their statement. I believe that when they made up their minds to imitate Irish whisky they intended and it was most natural for them to imitate that which was most in favour, and if they could deceive they would desire to deceive with respect to the best and not with respect to the worst whisky in the market, and I think they would choose a label looking like one on a whisky most in favour rather than one on a whisky the least in favour; and to my mind the label produced by Troedel and Co. under the defendants' instruction was admirably calculated to mislead. I do not mean to say that these two labels are misleading if placed side by side, and I think a number of witnesses called mistook altogether the real question which they had to determine, which was not that if the two labels were placed before them would they be able to say that the one label differed from the other because the Court itself can decide that; but the question is whether a person having perhaps only once seen one label and

desired to get another bottle of the same kind might not and would not take the defendants' label thinking it was the plaintiffs'. I have little hesitation in thinking that would be the result especially when the whole get up of the defendants' label is looked at. The defendants have got not only the floral border, not only the central tablet, not only the ribbon at the top, but they have got a label as closely the same in size as it is possible to get. In size and shape they are almost identical, in colouring they are very alike, and, in addition they are placed upon bottles which may have been used by other persons but yet are bottles of the same size and shape, and they are placed in the same position on the bottle; as it was the defendants' design to make their whisky pass for Irish, so I think it was their design to make it pass for the plaintiffs' whisky, and I think these matters so put altogether were admirably calculated to have that effect and I think the defendants' account of the retention of the ribbon at the top points strongly to the same conclusion. Originally they had "whisky" at the top but they say that a change was made in the label in order to preserve the balance of colour. That may be so, but preserving the balance of colour and changing "whisky" into "blend" tended to make the defendants' bottles marvellously like the plaintiffs'. I have arrived at the conclusion that the defendants fraudulently intended to make their label pass for the plaintiffs' and it was by using a bottle of the same size, and by using labels of the same size, shape and colouring that they calculated to bring about that effect. I therefore think the plaintiffs entitled to relief in that respect. I think, therefore, they should have an injunction restraining the defendants from using any device or mark which might represent to or lead anyone to believe that the defendants' whisky is the whisky of the plaintiffs. I think plaintiffs are entitled to an account of the profits on sales from the date on which the defendants first used this label. With regard to costs I think plaintiffs should have the general costs of the cause, the defendants to have the costs of the one issue upon which they have succeeded, viz., the infringement of the trade mark. I order the defendants to give up for destruction all labels similar to the one in dispute or any colourable imitation thereof at present in their possession.

Solicitors for the plaintiffs, *Davies, Campbell and Davies*; solicitors for the defendants, *Braham and Pirani*.

— = —
Before Hodges, J.

— = —
In the Divorce and Matrimonial Causes Jurisdiction.

— = —
RICHARDS V. RICHARDS.

— = —
December 7.

Marriage Act 1890 s. 74 (c.)

The respondent was convicted in New South Wales in 1887 for obtaining money under false pretences and

served a sentence of uncertain duration. Early in 1888 he was convicted in South Australia for passing a valueless cheque and was sentenced to 6 months imprisonment. In the same year shortly after his release he was again convicted of forgery for which he received a sentence of three years. Held that these amounted to frequent convictions within the meaning of s. 74 (c.) of the Marriage Act 1890.

This was a suit for a dissolution of marriage by the petitioner Caroline Richards against the respondent William Arthur Richards on the ground that he had within five years from the date of the petition undergone frequent convictions for crime and had been sentenced during such time in the aggregate to imprisonment for three years and upwards and had left the petitioner habitually without means of support. The respondent was convicted in Sydney in 1887 for obtaining money under false pretences and served a sentence of uncertain duration for the offence. In January 1888 he was convicted in Adelaide for passing a valueless cheque for which he was sentenced to six months imprisonment and in August of the same year he was again convicted at Adelaide for forgery and was sentenced to a term of three years.

Mr. Neighbour appeared for the petitioner.

There was no appearance for the respondent.

MR. JUSTICE HODGES.—In this case the petitioner was married to the respondent in 1886. Of the fact that the respondent has left the petitioner habitually without means of support I entertain no doubt; of the fact that during the last five years he has suffered convictions, and served sentences in the aggregate amounting to three years and upwards, I have no doubt. The only question I do entertain any doubt about is whether it can be said that the respondent has within the last five years undergone frequent convictions for crime. It appeared that, having been married in 1886, he was in gaol for some crime in Sydney in 1887, but for how long does not appear. In January, 1888, almost as soon as he was out of gaol for one offence, he is in gaol at Adelaide for a period of six months, getting out somewhere about July, 1888. In August following he is in gaol again. Now there are these three separate convictions against him, and there must have been three separate sentences, the last for three years, the second for six months, the length of the first I don't know—but all occurring within the statutory period, and each following closely on his liberation after each previous conviction. Having reference to the length of time he was sentenced as showing the nature of the crime, and that each of the sentences followed closely on one another, I think that these are frequent convictions within the meaning of this section, and fairly establish that the respondent has become or that his nature is set in a criminal direction, and if he has not become a habitual criminal he has fairly started on the road. And I think the Legislature meant to include within the meaning of that section persons who by reason of a series of convictions would not be able to discharge the duties or the responsibilities of a husband, and there is no doubt to my mind that the respondent was not able to dis-

charge the duties of a husband. There will be a decree nisi on the ground of "frequent convictions."

Proctors for the petitioner *Brahe & Gair*.

IN THE SUPREME COURT OF TASMANIA.

IN CHAMBERS.

(Before the Chief Justice.)

RAYNOR, appellant v. CURTAIN, respondent.

Mining Appeal—Mining Regulations 13 and 23.

Nov. 23rd., 26th., 1891.

Mugliston for appellant.

Urquhart for respondent.

The facts are set forth in the judgment.

THE CHIEF JUSTICE this is an appeal from the decision of the Commissioner of Mines at Strahan. A claim for a lease was marked out near Zeehan. The notices posted on the claim were in the names of "Illslow" and "Raynor", but the application for the lease was in the name of "Raynor" only; thereupon Curtain entered an objection to the issue of the lease. The Commissioner upheld the objection on the ground that the application for the lease did not agree with the notices posted on the ground, and against this decision Raynor appeals. In the case of *King v. Fitzgerald*, it was decided by the Supreme Court in July, 1881 under regulations similar to those now in force, that where the notices on the ground were in the name of one man, and the application was in his name and that of another, the application was good. The present case is the converse of that, the notices on the ground being in the names of two men, and the application for a lease being in the name of one only. If "Illslow" had objected to Raynor applying alone, he might have had good ground for his objection, but where one, who does not claim under Illslow objects, then I am of opinion that the case comes within the principle of the decision above cited. The additional name on the notice on the ground may be treated as surplusage, and the application is then regular. The appeal is allowed with costs.

Butler, McIntyre and Butler solicitors for appellant. *Urquhart, Stewart and Ornant*, solicitors for respondent.

(Before the Chief Justice.)

MUGLISTON, EXON. CREDITOR, v. DILLON, CLAIMANT.

(Oct. 27th., 1891.

Interpleader—Bricks made by licensee of owner of property subject to a mortgage liable to seizure by sheriff.

Execution creditor in person.

Mitchell for claimant.

THE CHIEF JUSTICE.—This is an interpleader summons, Mrs. Dillon having claimed both furniture and bricks levied upon by the sheriff. As to the furniture I held that it was Mrs. Dillon's. As to the bricks there was more difficulty. The brick-field is the property of Mrs. Dillon, subject to a mortgage, as to which default has been made. Mrs. Dillon permitted the debtor to make bricks on the brick-field, he did so, and some unburnt bricks and some burnt have been seized by the sheriff. It is lawful for a mortgagor to continue to use the land as it has been used before the mortgage. He perhaps may not be allowed to open new mines or new quarries on the land, but he can continue to work existing mines or quarries, and when once the mineral is severed it ceases to be part of the realty and becomes a personal chattel, the property of the mortgagor. The mortgagee can only seize the realty included in the mortgage and not the chattels upon it. If Mrs. Dillon had made the bricks in dispute in the ordinary course of working the mortgaged brickfields the mortgagee could not take possession of them under his mortgage. If Mrs. Dillon could make bricks herself, she could permit the debtor to do so, and the mortgagee would have no better claim against him than against her. I think the bricks are the debtor's and liable to be taken by the sheriff under the *fi fa*.

(Before the Full Court),

MILES v. LAMB.

Sept. 1891.

When there has been a breach of contract for non-return of shares and the price of such shares has been forced up by plaintiff, the plaintiff is not entitled by way of damages to the market value of the shares at the time of the breach, but only to what the jury may consider to be their fair value.

Mugliston, for plaintiff.

Attorney General, for defendant.

THE CHIEF JUSTICE.—This is an action brought by the plaintiff against the defendant for breach of contract in not returning 200 contributing shares in the West Adelaide silver-mine, lent to him by the plaintiff. The defendant paid into Court the sum of £45, and alleged that that was sufficient to satisfy the plaintiff's demand. This plea admitted the contract and its breach, and the only question at issue was the amount of damages. The £45 paid into Court represented the price of fully paid-up shares at the date of the breach of contract. The defendant, a broker, had sold 400 contributing shares in the mine, but on delivering the scrip it was discovered that 200 of them had been forfeited. He therefore required 200 to supply their place, and proceeded to purchase 200 on 'Change. The plaintiff and defendant both made an offer for 200 on 'Change, and a dispute arose as to who was entitled to the shares. This was decided in

favour of the plaintiff, who applied to the seller for immediate delivery, of the scrip. The seller, who by the rules of the Exchange had three days for delivery would not consent to this. The plaintiff and defendant thereupon agreed that the plaintiff should have the 200 purchased by the defendant, and lend the defendant at once 200 shares to be returned, according to the plaintiff. "in two or three days," and according to the defendant, to be returned "as soon as he could." This took place on the 17th July. On the following Wednesday, the 22nd, the plaintiff asked defendant for the shares. He said he would let the plaintiff have them before the middle of next week. On Friday, the 24th, the plaintiff wrote to the defendant to return the shares before 10 a.m. on the next day, or he would purchase at the defendant's risk. The defendant's solicitor called next morning on the plaintiff, and tendered him scrip for 200 paid-up shares in the mine; the also tendered him £45, the price of 200 paid-up shares, but the plaintiff refused to accept either tender, and purchased on the Stock Exchange that morning 200 contributing shares at £1 per share. The plaintiff sued for the £200 and brokerage. I told the jury that the plaintiff was entitled to the fair market value at the time of the breach, and that the price on 'Change was *prima facie* the market value, but that if the plaintiff had, with a view to this and other transactions raised the price on 'Change to a fictitious value, then they might consider what was the fair market value as between man and man, and give their verdict accordingly. The jury found that the amount paid in was sufficient, and there was a verdict for the defendant. A motion was made to the Court to set aside the verdict on the grounds of misdirection, and that the verdict was against the weight of evidence. The Court refused the rule on the first ground, but granted it on the second. The sole question is then whether there was evidence before the jury that would enable reasonable men to arrive at the conclusion at which they arrived. I pointed out what I meant by "fictitious," by the example of the case of a man purchasing a cargo of, say, tallow or wheat, to arrive, at the current market value at the port of its arrival, and a few days before its arrival selling small quantities of tallow or wheat at low prices, and so bringing down the quotation of the market, that that would not in my opinion be the market value, but a fictitious one as between the vendor and the purchaser of the cargo. I also gave an alternative example of raising the market. The evidence disclosed that a syndicate, consisting of the plaintiff and two others, was formed to buy up shares in the mine for the purpose, as plaintiff swore, of transferring its management to Melbourne, but whilst that may have been the original intention of the syndicate its subsequent action afforded abundant evidence for the jury that it had a very different motive in its more recent dealings. On the 17th July the plaintiff or syndicate held, according to the plaintiff's evidence, 35,000 contributing shares. There were originally 50,000 of these, but some 4,000 at least had been forfeited. The syndicate had 4,000 and upwards, contracted to be delivered in a

fortnight. They substantially held all the available contributing shares. That this was so the jury were justified in taking from the evidence of the plaintiff, who would not deny that he had offered to give £3 a piece for 1000 shares, but he added that he knew no one could get them, and in re-examination said if any one had them he would have been obliged to take them. The jury were entitled to draw the inference that the plaintiff and his associates so completely commanded the market that no one could obtain 1000 shares (even at the extraordinary price of £3 per share), and the syndicate had more than 4000 contracted to be delivered. This afforded evidence that there was no *bona fide* dealing at the time. The plaintiff swore that he bought and sold throughout. On the 28th he sold 2000 shares at 21s. 6d., probably for one of the unfortunates who had been what is euphemistically called "cornered." That he bought shares from Arthur Babington on the 17th and 20th. The plaintiff stated "He told me where the shares were coming from, I knew they were coming from me." There was evidence that the syndicate had the absolute control of the market to the extent that even 1,000 shares could not be found upon it at the price of £3, and they had power to raise the price to almost any figure they liked, and it was raised for a fortnight, as the syndicate's time bargains were falling in, and it was sworn by the defendant that the syndicate raised the prices. The jury had evidence that the dealings on the market were virtually the dealings of the syndicate and that there was not that real and *bona fide* dealing which creates the just test of what is the fair market value. The strongest corroborative evidence of this is that the fully paid-up shares, which represent a more valuable holding, either for removing the company to Melbourne, or for investment, were all the while about 4s 6d., whilst these "cornered" contributing shares were run up to 30s. till the end of the fortnight, or thereabout when they assumed their normal and true value of something less than the paid up shares. At the time of the loan the jury has a right to assume that the plaintiff must have known what was about to be done, and at the time the demand for the return for the shares was made the plaintiff did not require them to sell, as he wrote to the defendant, because he held thousands, but he saw the opportunity he had created to call for their return, and in default to purchase, and make the defendant pay the fictitious price they had created of more than four times the cost of the shares at the time of the loan. The transaction had every appearance of being a hard and unconscionable one. To test the position, suppose the syndicate had brought the whole 50,000 contributing shares, and had made time bargains for the delivery of 5,000. It would be impossible for the vendors to keep their contract. The syndicate could go on "Change and offer at £10 per share, or £20, or £100. Is it to be contended that a jury is bound to accept any of these sums in favour of the syndicate as the market value, and as the measure of damages sustained by the syndicate by the breach of contract even if they had sold to themselves or others one or two small lots

at such prices. The present case seems to me to differ from this only in degree. The Court, in my opinion, should not be astute to discover arguments for setting aside a verdict, but should seek to ascertain if there is any reasonable ground upon which the verdict may be supported, for the jury are the constitutional judges of the facts and of the inferences to be drawn from them, and their verdict is not lightly to be set aside. I think that the evidence in the present case amply justified the jury in the conclusion at which they arrived, and I regard the verdict as one calculated to promote fair dealing between man and man. The rule is discharged, with the usual result as to costs.

MR. JUSTICE DODDS.—I am unable to agree with His Honor's view of the evidence in this case, and upon the facts disclosed in his notes I should have come to a different conclusion from that of the jury. The action was to recover damages for the non-return of shares lent by the plaintiff, and was undefended save as to the amount of the damages. The defendant, a sharebroker, being under an obligation to deliver at once 200 West Adelaide contributing shares, purchased that number in the market, but being unable to obtain immediate delivery he asked the plaintiff to lend him 200 scrip to enable him to fulfil his contract. The loan was therefore made at the request of and for the benefit of the defendant. At this time, 17th July, contributing shares were at the same or a higher price than paid-up shares, and the defendant presumably was well aware of it. He must also have well known that a borrower of scrip takes the chance of a rise or fall in the market, and he therefore asked for the loan with his eyes open, and he accepted it with all its risks. In this case, the plaintiff having so elected, the measure of damage is the market price of the shares borrowed at the time of breach, and the jury's only duty was to ascertain that price. The evidence shows that it was 8s. or 9s., but it was contended for the defendant that that was not the true market price, but a fictitious one brought about by the action of the plaintiff as one of a syndicate in buying up the shares. Fictitious price must for the purposes of this contention mean an exceptional or a fraudulent price—exceptional as not being the general or ruling price, and therefore not the true market price, or fraudulent as being the result of some dishonest action, because there is no reason whatever why a person should not buy as largely as he pleases, although his so doing may have the effect of largely raising the price of stock. To illustrate.—A sale of only a small number of shares might be made at a low figure, but that would not necessarily be the true market price, it would be an exceptional one. If a person with a view to get a low quotation of the price of an article which he was under a contract to purchase at a given time, as in the case of the tallow put by His Honor, made sales at a low price, that would be a fraudulent price and a jury might very properly disregard the quotation in each case. These examples illustrate the case of a seller, and it is the seller who fixes the price, but the plaintiff was a buyer and he could only raise the price by surreptitiously putting

some of his own shares on the market, and buying them at a high price. By doing this, he would be raising the price generally, and as he was a buyer, he would certainly be acting against his own interest, especially in the earlier stages of his operations, and he appears to have bought largely after the 17th July. But there is no sufficient evidence that he did anything of the kind, for while it is undoubtedly right that the jury should set their faces against dishonest dealing, they should be careful not to assume it, except upon clear evidence. The plaintiff acted quite openly, and as to quote the evidence, "all the world" knew what he was doing. All the sharebrokers were buying and selling, and there cannot be any doubt that the defendant knew exactly what was going on. He gave as much (or more) for contributing shares as he could have bought paid-up ones for, which fact alone was sufficient to tell him that contributing shares were going up, even if he didn't otherwise know it. He might probably, on the same day that he borrowed have bought shares without loss to himself, to repay Miles, and he might certainly have bought the next day at no greater advance. He neglected to do so, although he saw a rising market, and he knew that he was taking the risk of it. The test illustration put by His Honor supposes a purchase where the whole of the shares are in the hands of the purchaser. The seller, therefore, was selling, that which he did not possess, and was entering into a purely speculative transaction, and is entitled to no consideration. The evidence in this case shows that many sellers sold speculatively to Miles to deliver at a future date, probably with a view of exhausting his funds, but he proved too strong for them. But the whole of the West Adelaide contributing shares were not in plaintiff's hands, and presumably the defendant could have bought to re-pay the plaintiff. The defendant offered paid-up shares to replace the contributing, and his counsel in argument asked why those were not accepted if plaintiff was acting fairly. There is a most complete answer. When the offer was made paid-up shares were selling at 4s. 6d., and contributing at about 25s. It is unreasonable to expect that the plaintiff would be willing to allow the defendant, for whose convenience the loan had been made, to make so large a profit at his expense. If defendant thought it right that plaintiff should take paid-up instead of contributing shares why did he not make the same offer to the person to whom he had to deliver in the first instance, instead of borrowing from the plaintiff? There are two considerations, however, which must guide me in deciding this application, First—The discretion of a jury is so large in such a case as this that it is very difficult to limit it, and the rule is that unless their verdict be perverse, or such as reasonable men could not fairly arrive at, it should not be disturbed. Secondly—The Court is in a great measure guided by whether the Judge who tried the cause is satisfied with the verdict or not. His Honor is satisfied, and although I should not have found as the jury did I am not prepared to say that the verdict was not within their discretion.

MR. JUSTICE ADAMS: the facts in evidence at the trial of this case which took place before His Honor the Chief Justice, are stated in his judgment, which has been read, and I do not propose to refer to them further. In my opinion it was open to the jury, who, presumably, were men of business, and competent to take a fair, equitable, and common-sense view of the case presented to them, to have given a verdict for the amount of damages claimed by the plaintiff and had they done so this Court might not have felt compelled to set aside such verdict. But the jury, having all the facts before them, came to the conclusion that the sum of £45, which the defendant had paid into Court, was enough to satisfy any damages the plaintiff sustained, and probably in arriving at that conclusion they had in view the action taken by the syndicate of which the plaintiff was an active member. I do not learn that the presiding Judge is dissatisfied with the verdict, and as it appears to me it was "consistent with the justice, conscience, and equity of the case" (*Wilkinson v. Payne*, 4 T.R., 468), I see no sufficient grounds for a new trial, and am of opinion the rule *nisi* should be discharged.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Hood, and Molesworth, J.J.)

MCCORMICK v. CUTHBERT.

Dec. 9, 10, 11, 14, 15, 16, 18.

Minister of the Crown—Libel—Absolute privilege.
Per Molesworth, J.—A Minister of the Crown is not absolutely privileged from actions of libel in respect of written statements made by him respecting the conduct of subordinate officers, although made in the course of his official duty.

Questions reserved for the Full Court by Molesworth, J.

[The facts are fully set out in the judgments of the Court.]

Dr. Madden and *Mr. Mitchell* appeared for the plaintiff.

Mr. Purves, Q.C., and *Mr. Isaacs* appeared for the defendant.

On the question of absolute privilege the following cases were cited in argument:—*King v. Wright*, 8 T.R., 293; *Davison v. Duncan*, 7 E. & B., 229; *Dickson v. Combermere*, 3 Fos. & Fin., 527; *Scott v. Stansfield*, L.R., 3 Exch. 220; *Dawkins v. Lord Paulet*, L.R. 5 Q.B. 94; *Dawkins v. Lord Rokeby*, L.R. 8 Q.B. 255; *Hart v. Gunpach*, L.R. 4 P.C. 439; *Allbut v. General Council of Medical Education and Registration*, 23 Q.B.D. 400; *Dickeson v. Hilliard*, L.R. 9 Exch. 79; *Grant v. Secretary of State for India*, 2 C.P.D. 445.

MOLESWORTH, J. (dissentiens)—In the action of George Dheil McCormick, a police magistrate, and a licensed magistrate against the honorable Henry Cuthbert, the Minister of Justice for Victoria, certain points have been reserved for the opinion of the Supreme Court.

The action was brought to recover damages for two publications complained of as libels. One written on the 27th March, 1890, and the other on the 20th May, 1890. In order to understand the questions reserved it is necessary to look at certain facts proved Prior to March, 1890, Mr. Robertson, Mr. Bell, and the plaintiff were the Licensing Magistrates for the Courts held at Horsham, Murtoa, and other places, Mr. Robertson being the Chairman of the Bench. On or about the 16th December 1889, these three gentlemen arranged to hold a meeting of the Licensing Court, at Melbourne, on the 31st January 1890, in order to fix the time for holding Courts for the ensuing quarter. There was evidence that it had been the practice of some of the licensing magistrates to hold meetings in Melbourne to fix country Courts—Melbourne being considered a convenient place of meeting for magistrates who lived at great distances from each other, though this practice was not known to the defendant till about August 1890. On the 25th December 1889 the plaintiff applied for a month's leave of absence, dating from the 1st February. This application was approved of by the defendant on the 7th January 1890. On January 16th 1890 a Licensing Court was held at Horsham, Mr. Robertson, Mr. Bell, and the plaintiff constituting the Court. An application was made one by Wm. Henry Knight for a conditional certificate for a licence for a new house which he proposed to build. After taking evidence it was found that there was no objection to the application on the part of the inspector, whereupon the plaintiff called for the plans and specifications. The applicant's solicitor stated that his client had not time to get the plans prepared, and asked for an adjournment till the next month. On the plaintiff pointing out that the country should not be put to the expense of another court at Horsham, the Chairman of the Bench suggested that as the magistrates were to meet in Melbourne on the 31st January, the plans and specifications might be sent to Melbourne, and that the magistrates might offer to adjourn the further hearing of the case to Melbourne, and if the plans, etc., were approved of, grant the certificate. According to the evidence of the plaintiff, Mr. Ireland, the Solicitor for the applicant, Mr. Power, Mr. Hall, the Inspector of Licensing Districts, and Mr. Robertson, the Chairman of the Bench, the adjournment of the further hearing of Knight's case and also of the case of one Gallock from Horsham to Melbourne was for the convenience of the parties, and not for the convenience of the plaintiff or his brother magistrates. Knight's case was considered at the sitting of the court on the 31st January in Melbourne, the plans and specifications were minuted and approved, the attendance of witnesses not being required, no witnesses attended. The magistrates also fixed the

quarterly courts. Next day Mr. McCormick started for his holiday, and was away for a month from the colony. Mr. Robertson sent in his account for attendance in Melbourne on the 31st January, it was paid without question, he further stated in evidence "I received no communication reflecting on me, in connection with the meeting in Melbourne, neither did Mr. Bell to my knowledge." On the 6th February, 1890, while the plaintiff was out of the colony, the Secretary for the Law Department, Mr. Akehurst, sought information from Mr. Robertson, the chairman of the Bench, as to the circumstances which induced the Licensing Court to adjourn business arising in the extreme west of the colony to Melbourne. In the beginning of March 1890 the plaintiff sent in his account to the Law Department for the January expenses. Mr. Akehurst then submitted for the defendant's directions, a memo of the 20th March 1890 (Exhibit No. 10.) containing *inter alia* the following statement:—"A licensing court, of which "Mr. McCormick was a member was adjourned to "Melbourne for no reason that I can discover but to "suit Mr. McCormick's convenience, he wishing to "leave the colony the following day, on a month's "holiday, of course, this is given as the outcome of "the answers to enquiries, it has not been officially "reported, under such circumstances, should the extra "pay for a licensing court, out of his district be "allowed? The total additional cost of that adjourn-"ment to Melbourne was £7 to £8; still, as the Court "acted within its legal powers, I do not see that the "allowance can be refused. The Minister's decision "on these points will be a guide to future cases." Mr. Cuthbert states I received this memo. produced from Mr. Akehurst—on that I wrote, the memo. of the 27th March—"plaintiff's accounts were then under discussion. The first intimation which the plaintiff got as the adjournment of the court being the subject of censure was contained in the memo. of the 27th March 1890, which was as follows:—"Mr. McCormick is informed that his accounts for January have been under the consideration of the Minister of Justice It has been noticed that a licensing court has been adjourned from Horsham to Melbourne and held at Melbourne on the 31st. This adjournment, the Minister cannot but consider uncalled for, and whilst he does not desire to limit the discretion which the law has vested in magistrates, (he wishes it to be understood, that he will be obliged in future to withhold his sanction from payment of claims for travelling on adjournments from distant parts of the colony to Melbourne; unless he is satisfied that the exigencies of the particular case renders such an adjournment necessary) On this occasion, and subject to what is now pointed out these accounts have been passed for payment."

The plaintiff alleges that the defendant meant by the words in the parenthesis that the plaintiff as a police magistrate, and as a licensing magistrate, had improperly, and corruptly adjourned a certain case which had come before the Licensing Court at Horsham for determination to Melbourne not by reason of the necessity of such case, nor in the fair and

just interest of justice, and of the parties therein, but for the purpose of advancing the plaintiff's own interest pleasure or convenience. The jury awarded the plaintiff £10 damages for the publication set out in the above parenthesis. On the 30th April the plaintiff wrote to the defendant complaining that the defendant *had condemned him unheard*, and commenting on the statements contained in the memo. of the 27th March. Thereupon the plaintiff received from Mr. Akehurst a letter dated 20th May 1890 as follows:—Sir, referring to your letter of the 30th ultimo and to previous correspondence, I am now directed by the Minister of Justice to forward endorsed for your information a copy of a minute "*he has placed upon the file of papers*"; which said copy contained *inter alia* the words "The memorandum of the 27th March was written as sufficiently appears on its face, in accordance with the Minister's instructions and it properly conveys what was intended to be pointed out. . . . (with regard to holding the adjourned meeting on 31st idem in Melbourne, he wishes to state that before directing the memo. in question to be forwarded, he caused due enquiry to be made, with the result that he entertained no doubt that neither the convenience of the parties, nor the exigencies of the service, dictated the adjournment of the business to Melbourne.)" The plaintiff alleged that the defendant meant by the said words in the parenthesis in this second memo.; that after the Licensing Court at Horsham, of which the plaintiff, as such police magistrate, and as such Licensing Magistrate was a member, had adjourned a certain matter which had come before the said Court for determination by it from Horsham to Melbourne, the defendant had made due enquiry into the circumstances of the said adjournment of the said matter, and had ascertained, and in consequence entertained no doubt; that the plaintiff has caused and procured the said adjournment—not in the interest or for the convenience of the parties thereto, and with entire disregard of the interests of the Public Service of Victoria, in which the plaintiff was, and is a servant; but for some corrupt, indirect, or improper motive or interest or advantage of his own. The jury awarded the plaintiff £40 damages in respect of the words set out in the last parenthesis.

Coming now to the points reserved for the opinion of the Supreme Court. As to question No. 3—Whether the words complained of in the statement of claim, with or without the meaning alleged, are capable of bearing a libellous meaning—though not an answer to the precise question put, in my opinion the words complained of "regarding the context" are capable of bearing a libellous meaning (the defendant himself says so in his evidence). As to question No. 1—Were the words complained of in the statement of claim written on an occasion of absolute privilege? Assuming, for the purpose of answering this question that the point is open on the pleadings, I am of opinion that no authority has been cited which would support the proposition that the defendant can defend this action by alleging that the words complained of in the statement of claim were

written on an occasion of absolute privilege.

According to the argument for the defendant it is absolutely essential in the public interest, and for the benefit of the public, that the defendant should not be liable to an action for publishing a libel on any officer in his department, police magistrate, county court judge, or any other officer though it could be proved that he wrote the libel actuated by spite and the most vindictive malice, and without any foundation in fact justify him. I do not believe that such a state of things would be for the public benefit. I think therefore I do not believe the law to be as contended for by the defendant.

As to a judge, Lord Cockburn in one of the cases cited thought that if he maliciously slandered anyone he ought not to be allowed to defend himself by setting up the defence of absolute privilege. That opinion of the Lord Chief Justice of England has been overruled, and the position of a judge is now settled by authority.

In addition to this there are reasons for protecting persons, judges, witnesses, counsel and jurors, who "utter words" in a court of justice—which would apply also to the words of members of Parliament—speaking in Parliament that do not apply to the case of a minister writing libels in his office in the absence of authority. I do not think that the courts ought to extend to a person in the position of the defendant, the right to rely on this defence. Of course if Parliament thinks otherwise legislation will effect the object.

Question (2). Was there any evidence taken at the time of express malice on the defendant's part fit to be submitted to the jury? I think in this action the jury might have found a verdict for the defendant and if they had so found I do not think their verdict should have been disturbed; but I also think that it was competent for the jury to take the view they did of "*all the evidence of the point*," and that their finding should not be set aside consistently with the principles on which the court has hitherto acted. No doubt the burden of proving malice is on the plaintiff; but if there is evidence which would justify the jury as reasonable men, in coming to the conclusion that the defendant used the occasion for some indirect or wrong motive—he would not be protected. Malice may be proved by showing either that the defendant stated what he knew to be false, or that of anger, or for some other wrong motive the defendant has stated as true, that which he did not know to be true; or that he made the statements complained of recklessly, or by reason of his anger or other wrong motive. *Clark v. Molyneux*, 3 Q.B.D. 247. Malice may, I think, be proved by "acts and conduct" as well as by "words," and in looking at this question the court, should, I think, consider that the jury did not accept the defendant's explanations of his conduct. (The defendant's evidence being challenged). In fact, we are now considering not whether the verdict was right, but whether practically the decision of the jury should be set aside.

There was evidence of the following matters; from which I think the jury might infer malice. (1). *The*

plaintiff was the only one of the three magistrates censured; though he was the one who opposed the adjournment of the cases from Horsham to Melbourne. If the defendant had made proper enquiries he could have ascertained this fact before writing either of the libels—had he enquired “of the plaintiff” after his return from Tasmania, early in March, he would have learned the true facts from him. The jury may have thought that this should have been done before the libel was written. Had he done so he would have learned from the plaintiff that the adjournments were for the convenience of the parties, and not for the private convenience of the plaintiff. In fact there was evidence that the plaintiff was *condemned unheard*. (No. 2). As to the second libel, it was placed upon the file of papers that is recorded against the plaintiff for all time *before* a copy of the minute was sent to the plaintiff. It was competent for the jury to think that the defendant first recorded the libel, and then sent a copy of it to the plaintiff in consequence of what he calls “an impertinent letter from the plaintiff of the 30th April.” The jury may have also thought that such a memo should not be recorded till the plaintiff had seen it, and had an opportunity of denying the truth of the statements therein contained. (No. 3). There was evidence that the defendant persisted in leaving this memo recorded *after* the plaintiff had written to him on the 31st May 1890. “Whatever doubt there may have been in the previous memo of Mr. Akehurst; there can be none as to the meaning of the above quoted extract, as it is evidently intended as a clear and distinct charge against me of having been actuated by some corrupt and fraudulent motives in the discharge of my judicial functions. . . . The Minister of Justice has placed on the records of his department a memorandum pronouncing me guilty of one of the most serious crimes a judicial officer could be guilty of—He has pronounced me guilty of this crime on information admittedly obtained by means of a ‘*secret inquiry*’ at which I was neither present, nor had any notice of, and on evidence derived from sources of which I am kept in ignorance—which evidence I have not been permitted to have any knowledge of; so as to enable me to meet the charge or defend myself; that although this charge has been recorded against me, the Minister has not up to the present moment taken the ordinary precaution of ‘*asking of me*’ any explanation as to the circumstances of the case.” The letter concludes by asking the Minister to direct that the memo of the 20th May be removed from the records of his department. The defendant answers this by recording another memo (Exhibit K.) “The Minister’s minute of which Mr. McCormick complains contained no charge against him, of having been actuated by any corrupt or fraudulent motive, nor was any such charge intended. Mr. McCormick has no right to place on that minute an interpretation which it neither bears, nor was intended to bear. The Minister observes that Mr. McCormick has refrained from pointing out how the convenience of the parties interested in the application for the

“renewal of a publican’s license, or others having business pending was consulted by adjourning a further hearing from Horsham, (in which district it is understood, the parties reside), to Melbourne, a distance of over 200 miles. No doubt the applicant for the license had to attend in person; or be represented by his legal advisers, and the inspector of the Horsham licensing district had also to travel this long distance to be present at the hearing. Until a satisfactory explanation is given ‘*the Minister will continue to entertain the opinion that neither the convenience of the parties; nor the exigencies of the service dictated the adjournment of the business to Melbourne.*’” The jury may have thought that this memo containing a reiteration of the charge set out in the memo of the 20th May following after the plaintiff’s letter was a malicious act. Mr. McCormick on the 9th August writes “I regret that I am unable to accept the Minister’s denial of the intent and purport of the minute of the 20th May, more especially having in view a similar denial under precisely similar circumstances in recent correspondence relative to my removal from the Camperdown district at the request of Mr. Uren, M.L.A.” He also again complains of having been condemned unheard. He informs the defendant that he and his brother magistrates had both before and since the 16th December, 1889 in pursuance of their usual custom appointed the 31st January to meet in Melbourne for the purpose of fixing the days for holding the quarterly licensing Court for March. . . . He also points out how Knight’s application was adjourned from Horsham to the Court fixed at Melbourne for the 31st January, merely for the production and examination of plans and specifications, and how it was arranged that it would be unnecessary for Knight or any witness to attend and that the adjournments in Gallick’s case and the case from Murtoa did not involve the attendance of witnesses. He complains that the defendant by the memo of the 4th July 1890 has “reiterated” the libel of the 20th May and concludes his letter by asking the defendant to place upon the file of papers his written withdrawal of the unwarrantable and offensive charge he had made. To that letter no reply was sent. No. 4.—After the defendant received the plaintiff’s letter of the 9th August, and after he had got further information from Mr. Robertson (through Mr. Akehurst) and after he heard the evidence given at the trial by the plaintiff and the other witnesses (who were cross-examined on this point) to the effect that the adjournments of the cases from Horsham to Melbourne was for the convenience of Knight and Gallicks, and not of the plaintiff; he swears “I intended the minute to mean that the Court was adjourned for the plaintiff’s private conveniences, in my opinion had the convenience of the public alone been consulted the adjournment would have been to Horsham and not to Melbourne had the adjournment been to Horsham the three magistrates would have had to attend. Mr. Robertson lived at Horsham, Mr. Bell at Hamilton, and the plaintiff at Warrnambool. *After the evidence I have heard I am still of opinion*

"that it was the private convenience of the plaintiff and not of the parties that dictated the adjournment to Melbourne on the 31st January." I heard the plaintiff and Mr. Ireland say that the adjournment was for the convenience of the parties. I heard the plaintiff say that it was not right to put the country to the expense of an adjournment to Horsham. I heard Mr. Robertson say that the plaintiff's evidence as to the adjournment was correct. I also heard Mr. Hall's evidence. The witnesses who spoke as to the adjournment were not put to cross-examination on these points, I heard that the magistrates stated that as they were to sit in Melbourne on the 31st of January, they would, if the parties desired adjourn the cases to that court. I heard during this trial, and about the 9th August that the meeting for the 31st of January was fixed some time in December, about the 16th, and before the application for leave of absence. It was a personal advantage to the plaintiff that he should land in Melbourne on the 31st January free from expense i.e., the government would pay his expenses from Warrnambool to Melbourne. I believe that about the 16th Dec. the magistrate knew that the plaintiff was about to apply for leave of absence and that this was in their minds when the meeting of the 31st of January was fixed. . . . I don't withdraw what I have written I adhere to what is in the minute. I shall be surprised if the jury do not find that the adjournment was dictated by the convenience of the plaintiff. . . . I never wrote to the plaintiff and asked him for an explanation." The jury may have believed that the defendant must have been influenced by malice in giving this evidence. No. 5. The plaintiff was cross-examined as to the defendant's conduct towards him in other matters. He was pressed as to whether he believed the defendant had any personal ill-will towards him, the evidence thus extracted from the plaintiff by the defendant's counsel in cross-examination was before the jury: and as he gave "facts" to support his opinion that the defendant was actuated by personal ill will towards him the jury had to consider whether the facts stated supported the plaintiff's opinion. He gave the following evidence:—I believe at the time of the publication of the libel that the defendant had personal ill-will towards me, I would rather not have answered that question. My reasons for that opinion are contained in my correspondence with the Minister with regard to the Camperdown Court (Camperdown Court correspondence put in.) I was appointed by the defendant to the Warrnambool Court, I applied to be removed to Warrnambool—I considered taking me from my district was degrading me at the dictation of Mr. Uren, a member of Parliament. I believe defendant's statement is untrue when he said, "I did not allow the reference to Mr. McCormick's attendance to influence me in falling back on the old order of things &c." I also say that defendant's minute is untrue, "that no charge is made or implied." Considering Mr. Uren's letter. I say a charge was made by Mr. Uren, and the Minister removed me on that.

I think Uren's charge was malicious. Defendant acted on that, on improper grounds. . . . From the time the defendant sent the second memo I had never a moment's peace in the department. I was bombarded with memos. on every conceivable subject and my whole time, night and day was taken up repelling aggressive attacks on me. The memos. were principally from Mr. Harriman, I frequently applied to the defendant to protect me from these attacks he never would do so. . . . I considered the defendant removed me from the North Eastern District through political influence, I called on him, and told him so, defendant told me it was not so in 1889.) I think, I told him that a member of parliament said he would run me out, and that he boasted that he had done so. I am grounding my charge of malice on several matters. Mr. Cuthbert was never the same after to me "removing me, meant breaking up my home. He "stopped my leave, it was done maliciously—within "forty-eight (48) hours, and I was called on by "Mr. Harriman to give a return that no police magistrate was asked to do before."

From a reference to the Camperdown correspondence it will appear that Mr. Uren wrote "to the defendant" *inter alia* bringing under his notice the unsatisfactory attendance of the plaintiff at Camperdown. This letter containing what the plaintiff considers to be a charge against him is handed to Mr. Harriman and is forwarded to another police magistrate, Mr. Heron, and though the plaintiff stated that he had attended every court held in Camperdown since he had been in the district, with the exception of one day, when he telegraphed some days beforehand that he could not attend; and though he stated he would be glad if Mr. Uren would point out in what respect his attendance had been unsatisfactory, he is informed the day after he wrote that letter, by the secretary of the law department that "the Minister of Justice" requested him to be so good as to hand over the duties of police magistrate at Camperdown, to Mr. Heron. The plaintiff alleged that this curt and peremptory order is evidence of malice. The plaintiff also says his leave was stopped maliciously. His leave was stopped by a telegram addressed to him at Warrnambool and forwarded to the Port Phillip Club Hotel Melbourne in these words "30 January 1890—The Minister of Justice has revoked your leave of absence, remain in your district, letter posted you to-day B. C. Harriman."

The defendant in giving evidence stated "I therefore ordered that his leave of absence should be revoked, and directed that a "telegram" should be sent to him informing him of my determination." The fact was before the jury that a telegram was sent "instead of a letter," couched in language which the jury may have thought was intended to insult the plaintiff, as well as to degrade him in the opinion of these through whose hands the message passed. The plaintiff also swore "Mr. Cuthbert was never the same to me after the Benalla business, and that his leave of absence was stopped by refusing to give a return that no police magistrate was asked to do before (namely a return as

to where he was each day whether on duty or not).

The jury may have thought that the plaintiff should have been treated by the head of his department as a gentleman in the same way as a Supreme Court Judge should be treated by the head of his department, and I think that the facts which I have set out above were evidence to go to the jury on which they were entitled to find that the defendant caused to be written the matter complained of on the 27th March, and that the defendant wrote the matter complained of on the 20th May maliciously. The defendant not only pleaded a justification after he had learned all the facts but after he heard the facts sworn to at the trial, he, as a witness in effect, stated that he believed the plaintiff had acted dishonestly. All these matters were before the jury. They are in my opinion evidence fit to be submitted to the jury of express malice. I think "there is evidence from which it can be reasonably inferred that the defendant was acting otherwise than in the *bond fide* discharge of what he conceived "to be his duty." *Hart v. Gumpach* L.R. 4 P.C. page 461. If that be so according to the judgment of the Privy Council there would be evidence of express malice or malice in fact to go the jury.

The judgment of Higinbotham, C.J., and Hood J., was delivered by Higinbotham, C.J.:—Three questions have been reserved by the learned judge who tried this case for the opinion of the Full Court. It will be convenient to consider these questions in the following order—First.—Whether the words complained of in the statement of claim with or without the meaning alleged, are capable of bearing a libellous meaning? The words complained of in the second paragraph of the statement of claim are extracted from a minute dated March 27, 1890 signed by the secretary of the Law Department and written of the plaintiff by the authority of the defendant. The words and the meaning assigned to them are set forth in the second and third paragraph of the statement of claim as follows—

"He (meaning the defendant) wishes it to be understood that he (meaning the defendant) will be obliged in the future to withhold his (meaning the defendant's) sanction from payment of claims for travelling on adjournments from distant parts of the colony to Melbourne unless he (meaning the defendant) is satisfied that the exigencies of the particular case rendered an adjournment necessary."

"3. The defendant meant by the words aforesaid that the plaintiff as such police magistrate and as such licensing magistrate had improperly and corruptly adjourned a certain case which had come before the Licensing Court at Horsham for determination at Melbourne not by reason of the necessity of such case nor in the fair and just interest of justice and of the parties therein but for the purpose of advancing the plaintiff's own interests pleasure or convenience."

As to the words we say that with the meaning assigned to them in the inuendo these words are libellous, and that without the meaning assigned to them in the inuendo they are not capable of bearing a libellous meaning. The words complained of in the fourth paragraph of the statement of claim are extracted from a memorandum dated May 20, 1890 signed by the defendant as Minister of Justice, and written for the plaintiff. The words and the

meaning assigned to them by the plaintiff are set forth in the fourth and fifth paragraphs of the statement of claim as follows:—

"With regard to holding the adjourned meeting on the thirty-first idem, in Melbourne, he (meaning the defendant) wishes to state that before directing the memo, in question, to be forwarded he (meaning the defendant) caused due inquiry to be made with the result that he (meaning the defendant) entertained no doubt that neither the convenience of the parties nor the exigencies of the service dictated the adjournment of the business to Melbourne."

"5. The defendant meant by the said words that after the Licensing Court at Horsham, of which the plaintiff as such Police Magistrate and as such Licensing Magistrate was a member had adjourned a certain matter which had come before the said Court for determination by it from Horsham to Melbourne, the defendant had made due inquiry into the circumstances of the said adjournment of the said matter, and had ascertained and in consequence entertained no doubt that the plaintiff had caused and procured the said adjournment not in the interests or for the convenience of the parties thereto, and with entire disregard of the interests of the Public Service of Victoria, in which the plaintiff was and is a servant, but for some corrupt, indirect or improper motive, or interest, or advantage of his own."

As to these words we say that with the meaning assigned to them in the inuendo these words are libellous, and that without such meaning they are capable of bearing a libellous meaning.

The second question is as follows:—Second.—Was there any evidence taken at the trial of express malice on defendant's part fit to be submitted to the jury? In considering this question we are to assume that the minute of March 27, and the memorandum of May 20, are both of them libellous, and that each of them was written by, or by the authority of the defendant on a privileged occasion, that is to say on an occasion when the defendant was acting in the discharge of a public duty. The defendant was a Minister of the Crown charged with the administration of the 150th section of "The Licensing Act 1885," by which it was provided, among other things, that the travelling expenses of the members of the Licensing Court should be a charge upon and liquidated out of the trust fund created by the same Act. It was the defendant's duty in that position, as a servant of the Crown and responsible to Parliament, to see that moneys should only be drawn from the trust fund for the purposes authorised by the Legislature. The document containing the words complained of were written with reference to official claims for travelling expenses forwarded by the plaintiff, as a member of the Licensing Bench, to the department of the defendant for the approval of the defendant as the minister of the department and the departmental certificate which was required for payment of the claims. These claims were submitted to the defendant for his directions as minister on March 20, 1890.

The occasion of writing and publishing these libellous words being thus privileged it was incumbent upon the plaintiff, in order to deprive them of the protection of the privilege, to prove that the defendant in writing them, or authorising them to be written, was influenced by actual malice, or malice in fact. The meaning of the word "malice" as it is employed in the law which defines its effect upon privilege is now

fairly well established. "Malice" includes not only actual ill will, and spite, but also every unjustifiable intention to inflict injury upon the person defamed—per Brett, L.J. in *Clark v. Molyneux*, 3 Q.B.D. 247, and per Lindley L.J., in *Stewart v. Bell* (1891) 2 Q.B. 351. If a person uses an occasion to gratify his malice he uses it not for the reason which makes the occasion privileged. Such a use is a misuse of the occasion, and a person is not deprived of the protection of the privilege unless he has misused the privileged occasion and unless the reason why he has misused it is that he has been actuated by malice in fact per Brett, L.J. in *Capital and Counties Bank v. Henty*, 5 C.P.D. 542. "Malice," as it is thus defined, must be carefully distinguished from feelings of pride, anger, ill-temper, suspicion, well or ill-founded or unreasonable. Feelings of this kind are consistent with and no doubt often accompany malice, but they are also consistent with a complete absence of malice and with a strict observance of the duty which makes the occasion privileged. It is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence. *Somerville v. Hawkins*, 10 C.B. 590; *Laughton v. Bishop of Sodor and Mann*, L.R. 4 P.C. 508. Facts like these which are not in themselves evidence of malice cannot be evidence in support of the innuendo charging a libellous meaning. See per Lord Selbourne in *Capital and Counties Bank v. Henty* 7 App. Cas. 749.

Before proceeding to consider the facts of this case in the light of the foregoing definition we wish to distinctly point out that in this connection we are concerned only with the operation of the defendant's mind at a particular time. The state of that mind and the motives moving it when the alleged libels were written are the sole matters to be determined. On this subject the plaintiff's intentions, his grievances, real or imaginary, or anything he may have said or done, or that may have been said or done to him, are utterly immaterial except so far as they may assist to a proper conclusion upon the one point now to be determined.

We propose first to deal with the facts immediately leading up to the writing of the alleged defamatory matters.

In the end of 1889 and beginning of 1890 the plaintiff with Mr. Robertson and Mr. Bell constituted the licensing bench for Horsham. They were and are all police magistrates. Mr. Robertson resided at Horsham, Mr. Bell at Hamilton and Mr. McCornick at Warnambool, and Melbourne was not within their district.

On the 31st January 1890 they sat in Melbourne and held a Licensing Court and transacted some business which had been adjourned from Horsham. Next day the plaintiff left Victoria on leave of absence and while he was absent in the early part of February in pursuance of the usual practice Mr. Robertson and Mr. Bell sent to the Crown Law Department, their accounts for expenses, and in them charged for travelling expenses from Horsham to Melbourne. These accounts were

laid before the defendant, as Minister of Justice for his consideration, and thereupon he directed that Mr. Robertson who was the chairman should be communicated with.

Accordingly the following correspondence ensued between him and the office.

"Crown Law Offices,
"Melbourne, 6th February, 1890.

"Memo.

"Will the Chairman of the Licensing Court be so good as to report, for the information of the Minister of Justice, the circumstances which rendered it necessary that he and his colleagues should have recently come to Melbourne to hold a Licensing Court.

"A. P. AKEHURST,
"Secretary Law Department.

"J. ROBERTSON, Esq., P.M.
"Horsham."

[ENDORSED.]

"In reply to the within memo, I beg to report that I and my colleagues held an adjourned Licensing Court at Melbourne, on the 31st ult., in exercise of the power conferred by Section 19 of Act No. 949.

"JAMES ROBERTSON, P.M.
"Chairman of the Licensing Court.

"Horsham, 11 | 2 | 90.
"To the Honourable the Minister of Justice."

"Mr. Robertson seems to have rather misapprehended the bearing of the within memo. When I was in conversation with the Minister of Justice, on the subject of the adjournment in question, no doubt was felt as to the power of the Court to adjourn; but it appeared so unusual to adjourn business arising (as it is understood) in the extreme west of the Colony to Melbourne, that it was thought well to afford the chairman an opportunity for explanation as to the necessity for Police Magistrates taking such a long and expensive journey out of their own districts.

"A. P. AKEHURST.
"12 | 2 | 90."

"After due deliberation, and with the consent of all parties as a matter of convenience, the cases were adjourned to Melbourne by the Licensing Court.

"JAMES ROBERTSON, P.M.
"14 | 2 | 90. Chairman of the Licensing Court.
"To the Secretary Law Department.

"Another reason was this:—

"The renewal of a license upon the satisfactory completion of repairs was deferred until the 31st January. The licensee by whose default the postponement was occasioned promising to have the matter effected by that time, and as one of the Licensing Magistrates would quit this colony on leave of absence, on the 1st February, (being the next day) to some inconvenience, the case was adjourned to Melbourne.

"JAMES ROBERTSON, P.M.
"Horsham, 14 | 2 | 90.
"Melbourne was also a place just as easy of access as Horsham for the two Licensing Magistrates who would be out of their districts."

Now it is to be noticed that the first reply received is altogether beside the question put, which related to the circumstances which made an adjournment out of their district necessary and not to the power of the bench to grant an adjournment. When Mr. Robertson's attention is drawn to this he sent back three reasons written on the same paper, but at different times. There is nothing, however, in any of the reasons to show why the Court was adjourned to Melbourne. No hint is given as to how the convenience of the parties could be served by coming so far out of

the district, while there is a reference to the fact that Mr. McCormick would quit the colony on leave of absence on the 1st of February and to save inconvenience the case was adjourned to Melbourne. On reading this the Minister might naturally ask himself "to save inconvenience to whom"? and might very reasonably conclude that Mr. McCormick was the person referred to. Beyond telling the head of the department to give instructions that this practice of adjourning to Melbourne should not be followed in future, the defendant did nothing more at that time. The next thing that happened in relation to this matter was that in March 1890 Mr. McCormick sent in his accounts when the following memo. was brought under the Minister's notice.

Crown Law Offices.

Melbourne, 20th March, 1890.

"The attached claims from Mr. McCormick, P.M., are submitted for the Minister's directions. The points are:—

"Jan. 7, 14th, 15th. Having to go from Warrnambool to Horsham for Licensing Court, he travelled via Melbourne and back via Melbourne, thence to Warrnambool by steamer. There is a coach from Koroit via Penshurst to Hamilton, and another via MacArthur from Port Fairy. The necessity for return by steamer is not clear. Why not rail? The effect was that he remained an extra day in Melbourne and charged for it.

"30th, 31st. A Licensing Court of which Mr. McCormick was a member was adjourned to Melbourne for no reason that I can discover but to suit Mr. McCormick's convenience, he wishing to leave the colony the following day on a month's holiday. Of course, this is given as the outcome of the answers to inquiries. It has not been officially reported. Under such circumstances should the extra pay for a Licensing Court out of his district be allowed? The total additional cost of that adjournment to Melbourne was £7 to £8, still as the court acted within its legal powers, I do not see that the allowances can be refused. The Minister's decision on these points will be a guide for future cases.

A.P.A."

Having this document officially before him from the permanent head of his department Mr. Cuthbert caused the minute of 27th March to be written to the plaintiff which constitutes the first alleged libel. We think that it is difficult to understand how any minister in defendant's position with Mr. Robertson's unsatisfactory replies and this strong official memo before him could have written in any milder or less offensive terms. It is an intimation that while the accounts will be passed on this occasion, in future the minister must be satisfied that the expenditure has been necessarily incurred. We can see nothing in that document or in the circumstances under which it was sent that can justify any inference of "malice" against the plaintiff. It might have evoked from the plaintiff some explanation of the circumstances under which the Court in January was held in Melbourne but he seems to us to have entirely misapprehended its intention and its effect. On the 30th April he wrote to the defendant at length giving a full answer to a portion of the minute relating to another subject but on the question of the adjournment he took up much the same position as that assumed by Mr. Robertson in his first answer, viz., that the Licensing Court adjourn at discretion free from question by anyone. This letter also contains some slighting reference to the Secretary of the Law Department

with assertions that some of the statements in the minute of the 27th March are untrue and without foundation. This letter of the plaintiff's being laid before the defendant provoked the memo. of the 20th May which contains the second libel complained of. Again, considering the circumstances under which it was written and the relative official position of the parties we can see no evidence of any "malice."

Upon receipt of a copy of this memo. the plaintiff wrote on 31st May to the defendant and as we think again misapprehended the matter in dispute. In this letter he treats the memo of 10th May as charging him with corruption, complains of being condemned unheard and requests that the charge should be withdrawn. On 4th July, the defendant caused to be written the following memo and sent a copy of the plaintiff.

"The Minister's minute of which Mr. McCormick complains contained no charges against him of having been actuated by any corrupt or fraudulent motive, nor was any such charge intended. Mr. McCormick has no right to place on that minute an interpretation which it neither bears nor was intended to bear. The Minister observes that Mr. McCormick has refrained from pointing out how the convenience of the parties interested in the application for the renewal of a publican's license or others having business pending was consulted by adjourning the further hearing from Horsham in which district it is understood the parties reside to Melbourne a distance of over 200 miles. No doubt the applicant for the licence had to attend in person or be represented by his legal adviser and the inspector of Horsham Licensing district had also to travel this long distance to be present at the hearing until a satisfactory explanation is given the Minister will continue to entertain the opinion that neither the convenience of the parties nor the exigencies of the service dictated the adjournment of the business to Melbourne."

"Henry Cuthbert,

"Minister of Justice."

By this the plaintiff is assured that no charge of corruption was intended and his attention is drawn to the fact that no explanation has been given as to why the adjournment to Melbourne was necessary. That is certainly no evidence of "malice" so far, nor does the repetition in the last paragraph of the words quoted show any desire on the part of the defendant to do anything beyond his official duty. This memo was replied to by the plaintiff on the 9th May when he regrets that he is "unable to accept the Minister's denial of the intent and purport of that minute." Then for the first time are stated the full facts relating to the holding of the Court in Melbourne in January from which it appears that the object for which the Court had been fixed was to enable the magistrates to meet and arrange the dates for holding their courts in the ensuing quarter and that certain cases had been adjourned from the Horsham Court to this Court which had been previously fixed for Melbourne. This closed the correspondence on the matter now in dispute.

It is necessary now to consider what may be called the episode relating to the leave of absence. On the 25th December 1889 the plaintiff applied to the defendant for leave of absence and requested that he might be allowed an extra week. At that time there was pending between him and the department a dispute as to whether his accounts were in regular form

as to a certificate regarding a claim made by him for the expense of horse-hire and as to some other details. On the 19th December the plaintiff was informed that these documents should be returned promptly.

When the plaintiff's application for leave of absence was received it was granted as from 1st February 1890 but an intimation was sent to him on the 7th January 1890 that "it is specially desired that all matters now under correspondence may be concluded and papers returned before the 31st inst."

This intimation the plaintiff indorsed "noted and returned" but did nothing whatever to comply with the request of the department for further documents. Upon the 30th January 1890 the defendant was informed of Mr. McCormick's failure to conform to the wishes of the office and he revoked the leave of absence and directed that a telegram should be sent to Mr. McCormick informing him. Thereupon an extremely curt message was telegraphed to the plaintiff ordering him to remain in his district.

This revocation and this telegram have formed a ground upon which it has been urged that the defendant was actuated by improper motives in writing the alleged libels. We do not see any possible connection between the two things. The plaintiff had failed from the 19th December 1889 to the 30th January 1890 to comply with the request for further particulars of a claim he was making, and his attention had been specially called to the matter when his leave was granted. This is brought under the defendant's notice together with the fact that the leave of absence commences in two days. He directed a telegram to be sent, but there is nothing to show that he dictated or even knew of the wording of the telegram. And at the worst, this telegram only amounts to abruptness or want of consideration, and cannot we think be any evidence that in the subsequent correspondence the defendant was not honestly discharging his duty. In addition, a subsequent event completely disposes of any imputation of the ill will in this transaction. Upon receipt of this telegram the plaintiff called upon the defendant and complained of his leave being stopped and the defendant at once cancelled the revocation upon Mr. McCormick giving him a note substantially complying with the requirements of the department.

The next matter that has to be dealt with arises out of the removal of the Camperdown Court from Mr. McCormick's jurisdiction in which it is alleged that the defendant showed "malice." In October 1889 Mr. Uren, M.P., wrote to the Minister of Justice this letter:—

Parliament House, Melbourne 10 | 10 | 89.
"Dear Sir.—I have been requested by the residents of 'Camperdown to bring under your notice the necessity of 'holding courts of Petty Sessions weekly instead of monthly, 'and that the police magistrate be requested to attend at 'least fortnightly. I am further requested to bring under 'your notice the unsatisfactory attendance of the police 'magistrate from Warrnambool, and to ask you that you 'may revert to the old arrangement by which Mr. Heron, 'P.M., of Geelong, may be asked to preside.
"I am, dear Sir, yours truly, W. H. UREN.
"The Honorable Henry Cuthbert M.L.C. Minister of Justice."

This letter was forwarded to the plaintiff who replied.

"When I took over the Camperdown Court I left matters 'exactly as I found them, and made no alteration in the 'arrangements previously made by Mr. Heron, viz., monthly 'courts.

"No application has ever been made to me to hold the 'Court there more frequently; at the same time the amount 'of business done at the Court would warrant a fortnightly 'Court being held there, and I intended to suggest it as soon 'as the railway was opened between this and Terang but 'until the railway opens I would not be able to attend there 'fortnightly without neglecting some of my other Courts; in 'addition to which it would involve an additional expenditure 'of from £36 to £50 per annum for horse hire. A weekly 'court would be quite unnecessary. As regards what Mr. 'Uren calls 'the unsatisfactory attendance of the police mag- 'istrate' as I have attended every court held in Camperdown 'since I have been in the district, with the exception of one 'day when I telegraphed some days before hand that I could 'not attend I would be glad if Mr. Uren would point out 'in what respect my attendance has been 'unsatisfactory.'
Geo. D. McCORMICK, P.M."

Warrnambool 6.10. 89.

Mr. Uren's letter was then sent to Mr. Heron who was directed to resume the Camperdown Court and a notification was also sent to the plaintiff requesting him to hand over the duties thereof to Mr. Heron. Upon receipt of this notification Mr. McCormick wrote to the defendant on 18th October 1889 complaining and stating that the only inference to be drawn was that there was a charge against him of being unfit to discharge the duties of police magistrate at Camperdown. We cannot see any justification for this inference and so far as the defendant is concerned he wrote the following minute upon receipt of plaintiff's letter.

"No charge is either made or implied. Departmental 'changes are directed by me and Mr. Heron will take charge 'of Camperdown after the sitting of the court which Mr. 'McCormick will attend on the 7th proximo.

HENRY CUTHBERT,
Minister of Justice."

Mr. McCormick was however not satisfied with this. He interviewed some members of Parliament, and two of them Mr. Wilkinson and Mr. Officer saw the defendant on the subject. The latter was called as a witness for defendant and he said that after stating the case from the plaintiff's point of view and hearing the defendant they went away satisfied seeing nothing of hostility from defendant to plaintiff. The defendant subsequently added a further minute in these words—

"I wish to add to the above minute that in making the 'departmental change I did not allow the reference to Mr. 'McCormick's attendance as being unsatisfactory to influence 'me in arriving at the determination of falling back on the 'old order of things by including Camperdown in Mr. Heron's 'district.

Henry Cuthbert,
"Minister of Justice."

There is nothing in all this to show anything beyond ordinary departmental routine duties. It was said that the fact that Mr. Uren's letter was sent to Mr. Heron shows ill will to the plaintiff. Even so there is nothing to connect the defendant with it. The letter was received by him in the first instance but it then became an office paper, was forwarded to the plaintiff and apparently returned by him to the

office. This act like the previous one of the telegram may show want of taste or consideration but is not any evidence of "malice" in the proper sense of that term. Next it was strenuously urged that the fact that the plaintiff was alone attacked with reference to the adjournment to Melbourne and the other two magistrates were passed over in silence shows evidence of malice. We do not think so for several reasons. This contention admits that there was apparent ground for fault finding but urges that it was malicious to pick out one supposed offender and allow the others to go free. It is a curious view to say that because the defendant was wrong when he did not censure Mr. Robertson and Mr. Bell, he was also wrong when he did censure Mr. McCormick. Again this assumes that the defendant's minute of 27th March, contained a charge and we have already expressed our opinion that it does not. Moreover, so far as the defendant was concerned, the plaintiff's was the only case that was directly laid before him with a request for his decision and this may have arisen because in this case there were other matters involved, and there is also the fact that the matter indirectly arose out of Mr. McCormick's leave of absence. It was then said that the plaintiff was never asked to explain this adjournment, and was condemned unheard. This again assumes wrongly, that a charge was brought against the plaintiff on the 27th March, and overlooks altogether the statements that were before the defendant when the minute of that date was issued; matters which in our opinion effectually dispose of this point.

It was then said that certain matters in the cross-examination of the plaintiff afforded materials which should be left to the jury. But the jury in matters like this must act upon facts, and not upon the impressions or opinions of a witness, and nothing that the plaintiff was so asked amounted to more. The reasons that he gave for his opinions were based upon the Camperdown incident with which we have already dealt, and upon his removal from Benalla which he alleged was done by the defendant through political influence. If it required political influence to induce the defendant to remove the plaintiff it is very unlikely that he had any ill-will towards the plaintiff and the plaintiff's belief in such ill-will is completely answered by his own letters to the defendant in which he thanks him for "the courtesy you have on this as well as on all other occasions extended to me." The other grounds relied upon as evidence of malice we can deal with together. It was alleged that malice might be inferred from the facts that the defendant pleaded justification, re-iterated the words complained of and persisted in declaring in the witness box his belief that the adjournment was for the plaintiff's convenience. Even if such conduct would show anything more than obstinacy, pride or stupidity (which do not evidence malice) still this could only be so where it was unreasonable. It is to be observed that the sting (if any) of these alleged libels does not rest in the charge of adjourning cases to Melbourne. That was a matter

about which the defendant had no concern. It's real gravamen is that the magistrates are accused of making a claim for expenses against the department for holding a court in Melbourne, when that court was fixed for Melbourne to suit the plaintiff's convenience. Is this accusation altogether unreasonable, and is the defendant to be considered malicious if he entertained a suspicion that it was well founded? Up to the present moment, although, invited to do so, counsel for the plaintiff have been unable to state any reason why the magistrates could not have fixed their lists on January 16th when they met in Horsham without coming to Melbourne at all, except that the latter had been the practice. But if it had been the practice it must have been for the convenience of the magistrates themselves and in this particular instance Mr. Robertson's replies and plaintiff's leave of absence would not unfairly lead any man to the conclusion at which the defendant arrived. These replies of Mr. Robertson especially the last reason coupled with the fact that the plaintiff took up apparently the same position of legal defiance as is raised in Mr. Robertson's first reason would, we think, reasonably cause suspicion in the defendant's mind which would certainly not be removed by the discovery that the court was held in Melbourne, not because it was necessary to adjourn the Horsham cases but because the magistrates wanted to meet to arrange their future lists. The evidence that was given about the adjournment of the cases was quite beside the point because the court was not rendered necessary by reason of the adjournment of the cases, but the cases were adjourned because there was already a court fixed in Melbourne at which they could be heard.

After a careful examination of the whole of this case, therefore, and with a due consideration for the difference of opinion which unfortunately exists on the Bench, we feel compelled to say that in our opinion there is not the slightest evidence that could justify any reasonable man in coming to the conclusion that the defendant in writing the alleged libels was actuated by any improper motive, or that he did so with any other intention than that of honestly doing his duty.

We answer the second question in the negative.

The third question is as follows:—

Third—"Were the words complained of in the statement of claim written on an occasion of absolute privilege." "This question raises novel points of considerable difficulty upon which we are unwilling to give an opinion as we are precluded by circumstances from taking sufficient time for due consideration of them. Our answer to the second question renders a decision upon this third question unnecessary, and we abstain from answering it.

Solicitors for plaintiff *Gaunson and Wallace*; for defendant, *Crown Solicitor*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., a'Beckett and Hood J.J.)

CURWEN v. THE YAN YEAN CO. LIMITED AND LYON.

8, 9, 12, Oct., 19 Dec.

Vendor and purchaser—Sale of Land—Promoter—Fraudulent misrepresentation—Concealment of vendor—Form of relief.

Lyon, a promoter of a company intended to be formed induced the plaintiff to take a promoter's share therein by fraudulent misrepresentation. The company was subsequently formed and a number of shares were allotted to the plaintiff in respect of the money paid by him; afterwards the plaintiff was required to pay calls on the said shares. In an action by the plaintiff against Lyon and the company, Lyon was ordered to give an indemnity to the plaintiff in respect of the shares which he was fraudulently induced to take, and it was further ordered that the said shares should be transferred to Lyon and that the money originally paid by the plaintiff should be repaid to him by Lyon. See Ballantyne v. Raphael, 15 V.L.R., 538; MacVean v. Woolcott, 11 A.L.T. 74. Appeal from judgment of Webb J.

The plaintiff in his statement of claim, alleged that previous to its formation Lyon had been a promoter of the defendant company, and after the registration of the company had become one of its directors; on the 23rd May, 1888, Lyon induced the plaintiff to agree to take one share in a company which Lyon was then forming for the purpose of purchasing certain lands at Yan Yean; the plaintiff agreed to take such share and paid his money therefor subsequently. The plaintiff was induced to agree as aforesaid, and to pay his money by the fraud of Lyon in representing to him that he, Lyon and one Thomas Bent and one J. S. Vickery were taking shares in the company; and at the same time in fraudulently concealing from the plaintiff the fact that he, Lyon, as well as Bent and Vickery were the vendors of the lands to the company; the plaintiff was in consequence placed upon the register of the defendant company, and has been required to pay certain calls on the number of shares in respect of which his name was entered in the register, the plaintiff claimed (*inter alia*) rectification of the register (as against the defendant company), and damages (as against the defendant Lyon). Before trial the action was discontinued as against the company. Judgment was given as stated in the judgment of Higinbotham, C.J. The findings of fact of Webb, J., appear in the judgment of Higinbotham, C.J.

Mr. Higgins in support, cited Kerr on Fraud (2nd Ed.) 411; *Twycross v. Grant*, 2 C.P.D. 843; *Hogan v. Healey*, 11 Ir. Rep. C.L. 122; *Neubiggin v. Adams*, 34 Ch. D. 582; *Sternbach v. Fernley*, 9 Sim. 566; *Durant's Case*, 26 Beav. 270; *Rawlins v. Wickham*, 3 De G. & J.; *Peek v. Gurney*, L.R., 6 E. & J. Ap. 384;

Arkwright v. Newbold, 17 Ch. D. 301; *Smith v. Chadwick*, 20 Ch. D. 58; *Ballantyne v. Raphael*, 15 V.L.R. 538.

Dr. Madden and Mr. Irvine to oppose, cited *Pillans v. Harkness*, Colles 442; *Ballantyne v. Raphael*, 15 V.L.R. 538; *Macvean v. Woolcott*, 11 A.L.T. 74; *Hill v. Lane*, L.R. 11 Eq. 215; *Peek v. Gurney*, L.R. 6 E. & J. Ap. 384.

HIGINBOTHAM C.J.;—This is an appeal against a judgment given by Webb J., for the plaintiff with costs. The plaintiff alleged that he had been induced to purchase for £1,000, shares in the defendant company through the fraud of the defendant Lyon, in representing to the plaintiff that he and one Thomas Bent and one J. S. Vickery were taking shares in the company, and at the same time fraudulently concealing from the plaintiff the fact that the defendant, Bent, and Vickery were vendors to the defendant company of the land the company was purchasing. The action as against the defendant company was discontinued before the hearing. The plaintiff claimed in the alternative against the defendant Lyon "damages for the said fraud, and an indemnity against all liability in respect of the said shares." The particulars of special damages stated were the two sums of £100 and £900 with interest thereon. The learned judge found the facts as follows:—

1. That the defendant James Lyon was a promoter and director of the Yan Yean Land Company Limited.

2. That the defendant James Lyon, by the misrepresentation and concealment hereinafter mentioned, induced the plaintiff to take one share in a company of 100 of £1,000 each fully paid-up.

3. That the defendant James Lyon represented to the plaintiff that he, and one Bent and one Vickery were taking shares in the company, and that such representation was true.

4. That the defendant James Lyon concealed from the plaintiff that he, the said Bent and the said Vickery were the vendors to the company.

5. That the plaintiff never antecedently agreed to become a member of the said company, but having accepted scrip in it without objection, and retained the shares without any attempt, until this action, to repudiate them, he must, as between him and the company, be deemed to have assented to take such shares.

The learned judge thereupon ordered the defendant Lyon to pay to the plaintiff £1,000 and to indemnify him against any liability or loss in respect of his being a shareholder in the defendant company. Upon such payment being made and indemnity given, the plaintiff to assign or transfer to the defendant Lyon the 5,500 shares in the defendant company now standing in his name. The action as against Lyon may be viewed either as an action to recover damages for fraudulent concealment, amounting to fraudulent misrepresentation, or as an action to avoid the plaintiff's contract with the company as against Lyon, and to obtain restitution from Lyon and indemnity against all liability arising under the contract into which the plaintiff had been induced to enter by misrepresentation, fraudulent or not fraudulent. We are agreed that in the one aspect of the case or in the other the judgment appealed from should be affirmed. The learned primary judge following the cases of *Ballantyne v. Raphael*, 15 V.L.R., 538, and *MacVean v. Woolcott*,

11 A.L.T., 74, appear to have rested his decision upon the ground that the action was brought against Lyon for qualified restitution, and indemnity. The pleadings and the evidence, in my opinion, support this view. It is true that the statement of claim claims "damages" against this defendant, but the particulars show what was meant by this word, namely the deposit and purchase money of the shares and interest. No evidence of damages, that is to say, of loss naturally and reasonably flowing from the injury done, was tendered by the plaintiff, but assuming the shares to have been worthless, the plaintiff was entitled at least to a return of the money he had been induced to pay for them, and this is what the judge has given to him. Three objections against this judgment have been urged upon the hearing of the appeal. It has been argued, in the first place, that concealment alone is not a ground of action, and that there has been no misrepresentation proved. But to this it has been answered that concealment of a fact may cause the true representation of another fact to be misleading, and may thus become a substantive misrepresentation. Lyon truly represented to the plaintiff that he and two other persons were taking shares in this company, and by this means he induced the plaintiff, who believed that Lyon had been a successful speculator, to purchase shares. But it was not as a speculation that Lyon was taking shares. He was trying to sell his land, and the concealment of this fact from the plaintiff misled the plaintiff into the belief that the defendant was buying shares for an entirely different reason from that which really influenced him. A true representation, coupled with concealment, thus became a positive misrepresentation, calculated to deceive, and which did in fact deceive the plaintiff to his detriment. It was also contended that damages cannot be given and that indemnity cannot be ordered in an action brought to rescind a contract. Damages in the legal sense of the word were not awarded to the plaintiff by the judgment now appealed from. The money which the plaintiff was induced by the defendant's misrepresentation to expend in buying the shares is not damages. *Restitutio in integrum* is an essential term of the relief which may be claimed by a party who is entitled to rescind a contract, and that object could not be effected in the present case unless the defendant were required to return to the plaintiff the price of the shares. Indemnity against future losses from the contract into which the plaintiff had entered is another element of the relief to which the plaintiff is entitled. *Rawlins v. Wickham*, 1 Gif., 355. But indemnity is not damages; it is only putting the plaintiff back in his old position. *Newbiggin v. Adams*, 34 Ch., div. 589. We were pressed most strongly by the argument that the plaintiff could not obtain the rescission of his contract with the company in an action against Lyon. The action was brought against both the company and Lyon, and having been discontinued as against the company before the hearing, and the claim for rescission as against the company being thus abandoned, there remained no contract, it was said, between the plaintiff and the defendant Lyon to be

rescinded. It is true that the contract with the company has not been rescinded. It could not justly be rescinded because the company was not a party to the misrepresentation, and it ought not to be allowed to suffer because a stranger wrongfully induced the shareholder to enter into the contract. But while the contract, so far as the company is concerned, remains that same contract, so far as the person deceived is concerned, is rescinded, the wrong-doer being compelled to accept the shareholder's obligations to the company, and being permitted if he pleases to become the holder of the shares in substitution for the original holder. It was upon this principle that *Bullantyne v. Raphael*, 15 V.L.R. 538, and *M'Vean v. Woolcott*, 11 A.L.T. 74, were decided. There is no material difference between these two cases and the present case. The nature of the relief given, and in my opinion properly given, in all the three cases is the same. The appeal will be dismissed with costs.

Mr. Justice A'BECKETT said,—Two points have been argued on this appeal. The first was that on the findings of fact there had been no such misrepresentation by the defendant Lyon as to entitle the plaintiff to relief. The learned primary judge finds that the plaintiff was induced to buy by misrepresentation and concealment, and the nature of this appears by the findings numbered 3 and 4—i.e., "a representation that Lyon, Bent, and Vickery were taking shares in the company, which was true," and "a concealment from the plaintiff that Lyon, Bent, and Vickery were the vendors to the company." According to the cases decided in this Court, which the learned judge followed, a representation that certain persons are buyers may amount to a recommendation to rely on the judgment, skill, and experience of those persons. If they are in truth sellers, then judgment, skill, and experience are used to sell profitably not to buy profitably, and therefore ought not to be relied upon by those who are invited to become co-purchasers on the same terms with them. If they become purchasers relying on this representation they are misled and are entitled to avoid their contracts of purchase as against the persons who misled them. I agree with the principle upon which those cases and the case now before us were decided, and think that the suppression of the fact that the persons represented as buyers are also sellers amounts to misrepresentation, which, if it induces a contract, may be ground for setting aside the contract. The second point argued was that, assuming that there had been actionable misrepresentation, the wrong relief had been given; that damages had been assessed on a wrong principle, inasmuch as there had been no ascertainment of the value of the shares in the company which the plaintiff was induced to take, and that therefore the extent of the plaintiff's loss could not be estimated. The remedy given to the plaintiff in this case is not damages. It is of a peculiar kind adapted to the peculiar circumstances of the case, and intended to place the plaintiff and defendant as nearly as practicable in the position in which they would have stood if the plaintiff had not acted upon the misrepresentation made to him by the defendant.

It is the alternative relief asked for under the pleading No. 4 at the close of the statement of claim. It is called "damages for fraud, and an indemnity against all liability in respect of the shares," but it appears by the particulars of damage that the word "damages" is improperly used. That which is, in fact, sought by the statement of claim is the return of money already paid for the shares, and an indemnity against all payments which the plaintiff may hereafter be called upon to make in respect of them. This claim, if granted, involves a right on the part of the defendant, who has to make the re-payment, and to give the indemnity to have the shares transferred to him if he wishes. He is compelled to pay the price, and as the obvious consequence he is entitled to that for which the price is paid. The judgment under appeal does not force him to take over the shares, but allows him to do so if he wishes. In granting this relief the judge followed the cases of *Ballantyne v. Raphael* and *McVean v. Woolcott*. In those cases a person who had an interest in land which he and another were trying to sell to a syndicate, induced the plaintiff to become a member of the syndicate by stating that he was one of the buyers and concealing the fact that he was a seller. The contract between the plaintiff and the other members of the syndicate could not be undone, because other persons not guilty of misrepresentation were parties to the contract, but its effect was considered as between the plaintiff and the defendant. Between them its effect was that, for a certain price, which the defendant had already partly secured, and the remainder of which he was entitled thereafter to receive, the plaintiff had acquired a certain share in land belonging to the defendant. The Court therefore said that as between plaintiff and defendant, the defendant should give back the purchase money paid, indemnify against the purchase money to be paid, and get back the share in his land which the plaintiff had been wrongfully induced to buy. It has been argued that, assuming this relief to have been properly given in the preceding cases, the relief given in this case has been improperly given, inasmuch as the plaintiff did not agree to join with others in buying land, but to join with others in becoming members of a company which was to buy land. I think this is not a material distinction. The company was merely the medium by which the individuals persuaded to become purchasers were bound into one for the purpose of buying. It does not appear that the company had any other object than that of making this purchase. It had power to do many things, but it only did this. As in the preceding cases the defendant got the plaintiff's money, and the plaintiff got a share in the defendant's land. The only new feature in the present case is that here the defendant did not get the money from the plaintiff direct, but from a corporation to whom the plaintiff paid it, and that the plaintiff had not an undivided interest in land vested in him or in a trustee for him, but certain shares in a company in whom the land was vested. I do not regard this as a substantial distinction from the preceding cases. I think that the relief given in those cases and

in the present case was properly given, and that the appeal should be dismissed with costs.

MR. JUSTICE HOOD said—While I concur in the conclusion at which the other members of the Court have arrived, I prefer to rest my decision upon the ground that the judgment for the plaintiff can be, and ought to be, supported upon the allegations in paragraph 5 of the statement of claim, viz., that the defendant had fraudulently induced the plaintiff to become a shareholder in this company. Two arguments were put forward on behalf of the defendant in answer to this view. The first is that the learned judge who tried the case did not arrive at any finding on the question of fraud. Even assuming this to be so, it does not dispose of the case, because by order 58 rule 4 of the Supreme Court rules this Court has power to draw inferences of fact, and we ought not to send a case down to a new trial if upon the materials before us we can finally deal with it in a manner that in our opinion will do justice between the parties. *Millar v. Toulmin*, 17 Q.B.D., 603; *Allcock v. Hall*, 1891, 1 Q.B.D., 444; *Scott v. Eddington*, 14 V.L.R., 41. Taking the findings of the learned judge and the admitted facts I think that no other conclusion can be arrived at than that the defendant acted fraudulently. He was the owner of certain land which he desired to sell. In order to carry out this desire he promoted a company to purchase that land, and induced the plaintiff to become a shareholder in that company by representing that he (the defendant), Bent and Vickery were also intending shareholders, and that he did so induce him is shown by the defendant's own evidence, which was that the plaintiff said, "I think I will chance a share because you seem to be lucky in your speculations." Now, at the time when the defendant made this representation, and the plaintiff made that remark the defendant knew that they (Bent and Vickery) were the vendors of the land, and that he was then promoting a company to buy his own land, and these facts he concealed. This concealment made his representation false and misleading, and any person in the position of the defendant must have known that this would be so. His representation meant, as the plaintiff understood it to mean, "I am going into a speculation in buying land, will you join me in that speculation"? If he had told the whole truth it would have meant "I am not going to speculate in buying land, but having bought land at £50 an acre I am now forming a company to purchase from me at £100, and am going to take shares in that company in order to induce others to do the same." It is very improbable if this had been said that the plaintiff would have taken any shares in the company, or have made the remark which he did make, and upon hearing that remark the defendant must have known what was passing, as an inducement in the plaintiff's mind, and he ought, in my opinion, to have at once disclosed the whole facts, and not to have suffered the plaintiff to be deceived by the words used, which did not convey the truth. I cannot, therefore, doubt that this concealment was wilful and fraudulent, and was intended to deceive,

and this in my opinion disposes of the first argument for the defendant. It was then contended that the plaintiff in this aspect had not proved any damages. I think the answer to this is that it was taken for granted, and admitted practically at the trial, that this company was not only worthless but was one in which the shareholders were under further liabilities. This view is supported by the uncontradicted statement of counsel for the plaintiff and by the significant fact that no mention of this failure of proof was made at the trial by application for either nonsuit or for direction. The defendant's own evidence shows that the company was only formed to purchase land at the Yan Yean, and his reference to the company having been stopped by proclamation from reselling—read with reference to section 239 of the Public Works Statute 1865—shows, I think, sufficiently the true position that the company was in. This being so, the amount which the plaintiff would be entitled to receive as damages would be the £1,000 already lost to him, the £275 the present call, and such further estimated sum as a jury might consider would cover his future liability. As the future liability would be altogether uncertain, and as even the present call might not be enforced, the form which the present judgment assumes is manifestly fair to both parties, and is indeed the only way in which “a complete indemnity could be given by a court of equity to the person who had been defrauded” (34 Ch. D., 592), and it is the form of relief claimed in *Peck v. Gurney* (L.R., 13, Eq. 79). It was argued that the plaintiff should have given evidence of the market value of these shares, but this test cannot apply to articles which no one would accept as a gift. I think, therefore, that the judgment appealed from should be affirmed and this appeal dismissed with costs.

Solicitors for the plaintiff, *Fox and Overend*, for the defendant company, *Lyons and Turner*; for the defendant Lyon, *Major*.

(Before Higinbotham, C.J., a'Beckett, and Hood, J.J.)

BARKER V. BREMNER, CHOMLEY, GARNISHER.

Nov. 30.

Order to review—Detention of prisoner's property—Garnishee—Attachable debt—Jurisdiction.

A. R. B. was arrested in New Zealand on a charge of obtaining money under false pretences. When arrested a large sum of money was found on him, the greater portion of which was converted into a bank draft and forwarded to the police in Victoria. An execution creditor of A. R. B. took out a summons to attach part of this sum in the hands of C., Chief Commissioner of Police in Victoria. The police magistrate who heard the summons made an order directing C. to pay to the execution creditor the sum of £54 4s., the amount of the judgment debt. An order to review this order was obtained. Held, that even assuming that the detention of the money from A. R. B. by the authorities in New

Zealand was a wrongful detention, still, inasmuch as there was no evidence that A. R. B. had waived such tort, the police magistrate had no jurisdiction to make the order he had made.

Order to review.

[The facts and arguments appear in the judgment of the Court.]

Mr. Box appeared to move the rule absolute.

Dr. McInerney appeared to show cause.

HIGINBOTHAM, C.J. :—This is an order to review an order of a police magistrate made on May 15, 1891, ordering Hussy Malone Chomley, Chief Commissioner of Police, to pay to John Barker the sum of £54 4s. upon the ground that on the facts disclosed in the affidavit of Constable John Bartholomew Flannery, the police magistrate had no jurisdiction to make the order. It appeared from the affidavit that Alfred Rawson Bremner was arrested on February 21, 1891, at Auckland, New Zealand, on a charge of obtaining money by false pretences. There was found in his possession at the time of arrest £171 3s. 6d., which was taken from him, and a part of the amount, £168 was subsequently forwarded by draft to the Police department, Victoria. The order attaching the alleged debt was served on the Chief Commissioner on or about April 14, 1891, before Bremner, who was brought back to Victoria, was tried. It does not appear whether Bremner was convicted or acquitted upon trial. The question raised upon this order to review is whether money found upon an accused person under commitment for trial and detained by the police authorities constitutes before trial and conviction a “debt owing or accruing” from the police authorities as garnishees and capable of being attached under section 117 of the Justices Act 1890. This case is distinct from and should not be confounded with the question raised in *Jones v. Peel*, 1 T.L.R., 305, and in *Greenwell v. Anderson*, 8 A.L.T. 21, cited in argument. There it was sought to attach money after conviction. Claims of this nature may, if they come with in Part IV. of the Crimes Act 1890, give rise to questions of a different character from that which we have now to determine. When a man is arrested, and property that he has on him or about him, or in his manual possession, must almost necessarily be seized with him. If he make no protest or objection, such property would be regularly held by the police. If, however, the prisoner demand possession or claim the right to dispose of such property, a further consideration arises. The prisoner is presumed to be innocent, and is arrested merely for safe custody until the trial. He does not lose by virtue merely of his arrest the right to alienate or otherwise deal with his property. On the other hand, it has been held, and we think rightly held, that the police are empowered under the warrant to arrest, to take, and retain possession of property in the possession of an accused person required for the prosecution including, of course, property believed to be the proceeds of the original crime—*Dillon v. O'Brien*, 14 C.C. 245, *Tyler v. South Western Railway Company*, News Digest 1888, p. 594. The necessity which

justifies the original seizure of property found on or about the arrested person, or in his manual possession, would also justify the retention until trial of such property, if its delivery would interfere with the proper custody of the prisoner, or violate regulations duly made for that purpose. Other limitations may possibly be created by the circumstances of particular cases, but objection to all such limitations reasonably and necessarily arising out of circumstances will reasonably and necessarily restrict the personal liberty of an accused person, assumed to be innocent. A person who is arrested and held in custody, awaiting trial, may retain full control of his property and may bring an action for the wrongful detention of it. But admitting this we are of opinion, then the execution creditor has wholly failed in his attempt to prove that the £168 or any part of it is a debt owing by Mr. Chomley, the chief commissioner of police, to Bremner. Assuming in his favour that this money was wrongly taken from Bremner in New Zealand and was there wrongfully converted into a bank draft, and that the money was absolutely his (none of which has been clearly established), this would only give Bremner an action of tort against the person in New Zealand who committed the wrong; and although that tort might have been waived by Bremner, there is no evidence that it has been, and if it has not been waived by him there is no debt. An execution creditor cannot waive a tort done by a third person to his debtor, so as to convert a right of action in a debtor to recover unliquidated damages for a wrong into a claim of debt for an ascertained sum capable of being attached and made payable to the creditor. The same remark applies to Mr. Chomley, through whose hands this money has passed. He had possession of it as commissioner of police, and not under any contract, express or implied, with Bremner. If Bremner had elected to waive the tort and had treated the money in Mr. Chomley's hands as money received to his use the case might have been different; the creditor cannot elect to do so in the room of Bremner. For all that appears Bremner may still be relying on his rights against the persons in New Zealand, and there is nothing whatever to show that he has ever in any recognised way Mr. Chomley as his debtor, so as to raise an implied debt for money had and received. The execution creditor on whom the burden of proof lay in this case has failed, therefore, to prove his debt, and the police magistrate had no jurisdiction to make the order under review. The order to review in this case and in the other two cases of *Murdock v. Bremner* and *Abbot v. Bremner*, which stand on the same ground, will be made absolute, with costs, and the orders of the magistrate will be rescinded.

Solicitor in support *Crown Solicitor.*

SUPREME COURT SITTINGS.

(Before Hodges, J.)

CARROLL V. WOOLDRIDGE AND OTHERS.

Nov. 12th and 13th.

A., the owner in fee simple of certain land granted a

lease of it, for mining purposes to B. for the term of 21 years dating from the 26th February 1881. In the year 1884 the Mining on Private Property Act 1884 came into force and on the 13th July 1885 B. obtained under that Act a mining lease for the term of 11 years giving him a right to mine on A's land. Subsequently these leases were assigned to C.

Held that on a breach by C. of the covenants of the lease from A to B., A. notwithstanding the subsisting mining lease from the Crown to B., was entitled to re-enter and dispossess C. of his land.

This was an action for trespass and for pulling down certain mining machinery and the plaintiff claimed £5000 damages.

By the defence the defendants denied the allegations of fact contained in the statement of claim and alleged that they were the transferees of a mining lease granted by the Crown under the Mining on Private property Act to the Princess United Mining Co. for the term of eleven years from the 13th July 1885 and said that if they did enter the said land (which they denied) they entered it by virtue of the powers and rights conferred by the said mining lease. They further alleged that the plaintiff by a lease dated the 26th February 1881 demised to the Princess United Mining Co. for the term of 21 years the land mentioned in the statement of claim and that the mining machinery in question was erected by the Princess United Mining Co. during the continuance of such lease and which by the terms of the said lease as well as at common law remained the property of the said Company with power to remove the same and they said that if they entered the said land and removed the said machinery (which they denied) they so entered and removed it by the direction and authority of the Princess United Mining Co. Alternatively they alleged they were justified in entering the land and removing the said machinery and alternatively without admitting any liability they paid 40s. into court and said that that was enough to satisfy the plaintiff's claim.

The reply was that one of the terms of the mining lease was that the grant and demise should not as between the parties interfere with the lease or agreement granted by the owner of the land to the lessees, and that the rights of the parties thereto must be determined by the conditions of such lease or agreement and not otherwise. That one of the terms of the lease or agreement was that if the lessee should suspend mining operations for the space of six calendar months at any one time the lessor should be entitled to enter upon the premises and repossess the same and that the lessor had for breach of such covenant by the lessees re-entered and determined the lease. As to the machinery the plaintiff alleged that it was affixed to the freehold and that the lease or agreement had provided that only in the event of the lessee observing the covenants of the lease should he be permitted to remove such machinery at the end or sooner determination of such lease or agreement.

The defendants by their rejoinder said that they were entitled to remove the said machinery within a reasonable time after the alleged determination of the

lease and that there was nothing in the lease which deprived the defendant from exercising such right.

[The remaining facts appear in the judgment.]

Dr. Madten, and *Mr. Barrett* appeared for the plaintiff.

Mr. Finlayson and *Mr. Mitchell* appeared for the defendants.

Dr. Madden.—Section 8 of the Act provides for the registration of the lease, but nowhere in the Act is it said that the lease must be registered. The effect of registration is to prevent third parties from coming in over the heads of the lessee and getting a grant. Section 11 shows that the mining lease is to be in a special form, but whatever form it is in it does not affect the agreement between the private owner and the person desiring to mine. If there is already a subsisting lease between landlord and tenant then the mining lease is subject to that. Section 38 relates to a lease standing by itself. The whole policy of the Act is to allow the parties if they can to come to an agreement between themselves, and if they can't or won't then the Act steps in. The Act authorises a person to have the compensation assessed, and then get a lease, which will entitle him to mine. The Act does not invalidate a lease which is not registered, but merely prevents an unregistered lessee from having priority over another applicant.

Mr. Mitchell for the defendant.—The effect of the Act is that, if there is an agreement between the parties, then the tenant may make an application for a mining lease, and Sections 9 and 13 point out the kind of agreement that may be made. The covenants of the other lease do not determine the mining lease, but the owner has his remedy for breach of covenant under the lease. There are certain grounds given in Section 38 for which the owner can determine the mining lease, and if the mining lease is subject to the covenants and provisions of the lease between the parties these must exist reciprocally. Then assuming that the plaintiff has a right to determine the lease I submit he must show that he has first determined the lease. [Hodges, J.: Assuming that he had power to determine the lease the burden is thrown on your shoulders to show that this plant, etc., was yours.] Our contention is that these fixtures, having been put up by the lessee, he is entitled to enter the land and remove them after the lease has been determined. *Weedon v. Woolwick*, 7 M. & W. 14, which lays down the general principle of the right of a tenant to remove fixtures.

Dr. Madden in reply.—The onus is on the other side to show that they have complied with the conditions of the lease and also to show that the fixtures are theirs, in both of which they have failed. The law is quite plain that a tenant who is entitled to fixtures must remove them during the tenancy or within a reasonable time after the determination of the tenancy, and no evidence has been given that any attempt was made to remove these fixtures. Then it is said by the defendants that they bought their fixtures from a prior owner, the Countess Company. I objected that this was a bill of sale, and must be registered to be

valid; but it was suggested by the Court that someone might have been put in possession, and evidence of some person having been put in possession was given, but that person was not himself called, and when the defendants took this lease from Carroll, not a word was breathed concerning these fixtures, and I submit, therefore, that he is now estopped.

MR. JUSTICE HODGES.—The plaintiff, the owner in fee, in this action seeks to recover damages from the defendants for trespass by the defendants, and for damage done on the 26th and 27th of September, 1890 to the plaintiff's land. The defendants in answer say: First.—We are now or were at that time in possession of this land under an unexpired and undetermined term, and so we had a right at that time to be on the land; and secondly, even if the term was validly determined we had the right to go on the land, and remove the tenants fixtures, and the question is whether they have sustained either of these defences. It appears that the plaintiff on the 26th February, 1881, leased this ground to the Princess United Mining Co No-Liability, for the purpose of mining upon it for a period of 21 years; and while that agreement or lease, or whatever name it might be called was in force, the *Mining on Private Property Act*, 1884, came into force. By section 4 of that Act it was provided that—

"Any lease or agreement existing on the first day of August one thousand eight hundred and eighty-four and purporting to give the right to mine in or on private land and made between the owner of such private land and any other person may be registered as hereinafter provided by any of the parties thereto or the assignees thereof."

Now that section applies to that particular document because when that Act came into operation, this agreement or lease purporting to give the right to mine on private land was in force. Then that section provides that the lease having been registered application may be made for a mining lease. Application seems to have been made for a mining lease, and on the 13th July, 1885, the crown grant was issued to the Princess United Mining Company, No Liability, for a period of 11 years, giving the right to mine subject to different covenants and provisions contained in it. The contention of the defendants is that that mining lease gives them the right to remain on and work the property, and that their right to remain there can be determined and only determined by the crown, and that by reason of the *Mining on Private Property Act* 1884, no person but the crown can determine their term or put an end to their right to remain to mine on this ground, and they say that the crown has not determined it, and that therefore they have an unexpired lease; (I should add that they have a certificate of title for this lease,) so I have to determine whether any person other than the crown can take any steps to determine the right of the defendant company, who are the assignees of this mining lease, the other defendants acting under their authority. The certificate of title put in is simply a certificate which gives them the land on the terms and conditions contained in the mining lease so I need not trouble about the certificate of title, I go to the mining lease. Now it is said that this mining

lease gives an estate for 11 years, and that during that period the owner of that land has no remedy except in so far as he can set the crown in motion, or that he may possibly sue for breaches of the agreement but that is his only remedy and that is stated on the authority of Section 9 of the *Mining on Private Property Act 1884*, the latter part of which provides that when the agreement is registered and a mining lease executed,

"Such lease or agreement may with regard to all reservations covenants and provisions therein contained and all matters arising under it with regard to the rights derived through it of all parties claiming a right to mine on such private land be enforced on and from the date of such mining lease in the same manner as if it had been an agreement or contract made under the provisions of this Act."

Then it is said that s. 38 of the Act shows that the Attorney-General or someone on behalf of Her Majesty can take proceedings to eject where there has been any breach of the provisions of the mining lease. That section provides—

"In case any mining lease granted under the authority of this Act is, or is liable to be, forfeited or declared void or determined by any breach of covenant or condition or otherwise or in case the term thereby granted has expired, possession of the mines demised shall and may be recovered on behalf of Her Majesty in such manner as may be provided by any of the conditions of such mining lease."

and they say that that is the remedy and the only remedy given by the Act and consequently that the Crown and it only can take proceedings. On the other hand, section 13, and in fact, sections 10, 11, 12 & 13 of this Act are important in this aspect of the question, and it is not to be lost sight of that the statute itself provides that these leases are not to vary contracts as made between parties and in the regulations which are made under the statute. The 2nd regulations provides that:—

"Nothing in these regulations contained shall be applied so as to interfere (as between the parties to any lease or agreement existing on the first day of August one thousand eight hundred and eighty-four) with any such lease or agreement, and subject as aforesaid all these regulations except the regulations numbered seven and twenty-five, and except also so far as they relate to the ascertaining and the payment of the amount of any compensation shall extend and apply to all persons who desire to mine on any lands of which they themselves are owners and occupiers, and to all persons mining under any lease or agreement existing on the first day of August one thousand eight hundred and eighty-four."

Now if the contention of the defendants is correct the provisions of the agreement between the parties have been seriously affected and all provisions entitling a party to take possession for breach of covenants are annihilated and gone altogether. I think, however, that an examination of the Crown lease itself would show that the Crown would not be entitled to claim possession for breach of the covenants in the agreements. The Crown lease itself says:—

"That in consideration of the rent hereinafter reserved and of the covenants and provisions hereinafter contained Her Majesty does by these presents grant and devise unto the lessee &c. all those mines of gold and silver &c. for the purpose of mining for working and winning the said gold &c. To hold the said mine land and premises (subject nevertheless to such rights interests and authorities as may be lawfully subsisting therein at the date of these presents.)"

So that this grant itself in express terms provides that it is not to interfere with that agreement. Then

the proviso for re entry is in these words:—

"If the lessee his executors administrators or transferees shall at any time during the said term fail to use such land mine and premises *bona fide* for the purpose for which it has been demised &c. or if and whenever there shall be a breach of or non-compliance with the covenants and provisions herein contained by the lessee &c. the interest of the lessee &c. under these presents shall cease and determine both at law and in equity and it shall be lawful for Her Majesty her heirs and successors or her or their agents or officers or for any bailiff of Crown lands without any previous demand whatsoever to enter forthwith unto and upon the said land &c."

So that what a person has to do is to perform the covenants and provisions contained in this lease and if he does so then the Crown has no right to enter. It is true that it says that it shall not interfere with the agreement, but it does not provide that for any breach of the agreement between the parties the Crown may enter and then there is no proviso securing their performance so the lessees could disregard the terms of their lease from the plaintiff. But then there is nothing in this lease which would authorise the plaintiff to enter and the Crown could not for breach of that agreement determine the tenancy and consequently if the contention of the defendants were correct the agreement between the plaintiff and the Princess United Mining Co. would not only be affected but the greater portion of it would be annihilated by the construction which they would give to the Crown grant and the construction which they give to the other portions of this Act. But in my opinion the remedy of either party on his agreement remains as before, and though it seems somewhat anomalous that there should be two distinct parties entitled to turn the lessee out, it is no more than exists in an under-lease except that the lessee under an under lease is in a more unfortunate position as he is liable to be turned out of possession not only for his own breaches but also for those committed by his lessor. Here the lessee is only liable to be turned out by one party under each contract; if he breaks one set of conditions the owner may enforce his right of entry and if he breaks the other set the crown. I entertain very little doubt that, the legislature did not intend to take away the owners rights under his agreement but rather means to preserve the agreement and it would be idle to talk of preserving it if there is no remedy for reinforcing it. I am therefore of opinion that this contention of the defendant is not well founded. Then it is said that this agreement between the plaintiff and The Princess United Mining Co. is not proved to have been registered under the Act. I do not know whether that would have been any answer. This crown lease can only properly have been granted if that lease had been registered, but whether it had been registered or not this lease is expressly made with that liability imposed upon them. Their lease upon which they rely leaves them under an obligation to perform these covenants.

The second answer was that even if this lease has been determined the defendants had a right to go on the land for the purpose of removing tenants fixtures. The difficulty there, is defect of proof they have not proved their title to these fixtures. Before going fur-

ther I think I should say (by the way) that it is not disputed between the parties to that agreement, between the plaintiff and the Princess United Mining Company that the plaintiff's right of entry had accrued if the plaintiff had that right under the agreement, so I have not dealt with that; the covenants had been broken and the plaintiff had the right to enter. For the defendants their evidence of title started with the evidence of a witness who said that there had been a lease from Owen Thomas to the Countess Mining Company and that this plant had been erected by the Countess Mining Company and that they had bought it from the Countess Mining Company but I am not satisfied with this part of the case at all. I do not doubt that some person was in some way or other told off to go to this building and take possession of this plant but how he took possession or what was done I am not clear. I do not feel clear that the Countess Mining Company may not have been mere trespassers and if that be the case they would have no tenants fixtures to sell. I think therefore both defences have failed. On the question of damages I am disposed to take the evidence of the lowest amount mentioned by one of the witnesses for the plaintiff which was £400. This is slightly more than the amount fixed by the defendant's witnesses.

Judgment will be for the plaintiff for the sum of £400 with costs.

Solicitors for the plaintiff *Cuthbert, Hamilton, Wynne and Co.*; solicitor for the defendants, *Gill*.

IN CHAMBERS.

(Hood J.)

CALDWELL v. DONALDSON.

Feb. 4 1892.

Rules of Supreme Court 1884 Order XXII r. 1—Order XXXVI r. 37—Slander—Payment into Court—Denial of Liability—Innuendo—Particulars of evidence in mitigation of damages—where in an action of slander the alleged innuendo places a meaning on the words other than their natural meaning the defendant may admit the slander and pay money into court and may deny the innuendo—Particulars under Order XXXVI r. 37 are not part of the pleadings and should not be filed as such.

This was an application by summons on behalf of the plaintiff for an order that the defence and particulars thereunder be amended or struck out on the grounds that the same tend to embarrass the fair trial of the action and that the same are not in compliance with the Rules of the Supreme Court, O. XXII. r. 1. The statement of claim was in the following form—

1. The plaintiff is a Stock and Share Broker carrying on business in Melbourne. 2. On the 22nd Oct. 1891, the defendant falsely and maliciously spoke and published of the plaintiff in his business as a Stock and Share Broker the words following "I'll stop you issuing valueless cheques. I'll bring a policeman and have you arrested for this" and also (addressing certain by-standers and displaying a cheque) "Look here he robbed me of this money, here is his dishonest cheque" meaning by the said words that the plaintiff had been guilty of fraudulent and dishonest practices in his business as a Stock and Share Broker and that the plaintiff had been guilty of the indictable offence of obtaining money from him the defendant by false pretences and was liable to arrest, imprisonment, and punishment for the same. The defence was as follows: 1. The defendant denies that he meant by the words complained of the meaning or any of the meanings alleged in the innuendoes contained in the statement of claim. 2. As to the words complained of without the alleged meanings the defendant brings £10 into court and says that the same is sufficient to satisfy the plaintiff's claim.

With this defence and on the same piece of paper particulars were delivered pursuant to Order XXXVI. r. 37.

Mr. Fink in support of the summons. The defence is a denial of liability and the defendant is not allowed with such a defence in an action for slander to pay money into court. It is against the express provisions of O. XXII. r. 1. If the words have only the one meaning the innuendo is surplusage and if the defendant had objected thereto he should have moved to have them struck out.

Counsel referred to *Fleming v. Dollar* (23 Q.B.D. 388.)

Mr. Isaacs to oppose. The fact that the innuendo is put in show that the words do not naturally bear the meaning sought to be placed upon them. The defence admits the speaking of the words without the alleged meaning and pays £10 into court; that does not amount to a denial of liability. The particulars annexed under O. XXXVI. r. 37 are not part of the pleadings and were never intended to be so.

HIS HONOR said—With regard to the particulars delivered I have no doubt at all that they are not part of the pleading; it is merely a notice which has to be given by the defendant in order to enable him to give certain evidence at the trial. As to the other point I was a little troubled as to whether the innuendo set out does not set out the only possible meaning the words could bear but I think now that the innuendo does carry it beyond the natural meaning. There is no defence to the slander. The defendant admits the slander but says that the words do not carry the slanderous meaning which the plaintiff seeks to put upon them. The plaintiff should be careful not to file the notice of particulars as part of the pleadings. I dismiss the summons with £3 3s. 0d. costs and certify for counsel. Summons dismissed.

Solicitors for plaintiff, *Fink, Best, and P. D. Phillips*; solicitor for defendant, *J. A. Isaacs*.

Higinbotham C.J.

GILCHRIST v. GILCHRIST.

Dec. 9, 16 1891.

Marriage Act 1890 (No. 1166) ss. 87, 96—alimony—attachment—The court has power to grant an attachment against a husband for non-payment of arrears of an annuity included in an order absolute for divorce—Defects in an order not appealed from in a matter in which the court has jurisdiction cannot be relied on as an answer to a proceeding to enforce an order.

Motion for attachment.

This was a motion for attachment of the respondent in a suit for divorce, for contempt for non-compliance with an order dated October 6th 1891, making absolute a decree *nisi* dissolving a marriage. The decree absolute contained an order for payment by the respondent to the petitioner on and after the date thereof at the office of the petitioner's proctor of permanent alimony at the rate of £8 per lunar month for the support of the petitioner and £4 per lunar month for support of respondent's child, such sums to be computed and payable from the 8th day of September, 1891, the date when the decree *nisi* could be made absolute.

Dr. Madden in support of the motion.

Mr Cussen to oppose. —There are several objections to this order which should be taken by way of preliminary objections. An order for attachment cannot be made for non-payment of money after a final order has been made. This order is a final order inasmuch as it provides for the maintenance of the child and such a provision can only be made in a final order. The order is bad as it does not fix any time for the payment of the money, it directs the money to be paid "at the rate of" so much per month but does not order it to be paid per month and does not fix the day of payment. It is payable "per lunar month" and the Act directs that it is to be payable "per calendar month." The Court had no jurisdiction to make an order in this form directing payment of money simply the order should have been to secure to the wife a gross or annual sum of money. *Medway v. Medway* (7 P.D. 122) Counsel also cited *De Lossy v. De Lossy* (15 P.D. 115).

Madden.—The case of *De Lossy v. De Lossy* is in direct opposition to the decision of this Court in *Stephen v. Stephen* (unreported).

The mode of payment is sufficiently definite and the objection is not open now, while the order stands, the respondent if dissatisfied with the order should have appealed.

HIS HONOR said.—I will consider the matter.

HIS HONOR on a subsequent day read the following judgment.—Motion for attachment of the respondent for contempt for non-compliance with an order dated Oct. 6th, 1891, making absolute a decree *nisi* dissolving a marriage by reason of the adultery of the respondent coupled with cruelty. The decree ab-

solute contained an order for payment by the respondent to the petitioner, on and after the date thereof at the office of the petitioner's proctor of permanent alimony at the rate of £8 per lunar month for the support of the petitioner, and £4 per lunar month for the support of respondent's child, such sums of alimony to be computed and payable from the 8th day of September, 1891, the date when the decree *nisi* could be made absolute. This order is made under the joint authority of sections 87 and 96 of the *Marriage Act 1890*. Various preliminary objections were taken to the motion. It was contended that the court has no power to issue attachment for breach of an order for permanent alimony. In the case of *De Lossy v. De Lossy* 15 P.D. 115 which was cited in support of this objection, Butt, J. held that the court had no power to grant an attachment against a husband for non-payment of arrears of an annuity due under an order to pay permanent alimony included in an order absolute for divorce. The full court in *Stephen v. Stephen* did not concur in this view and granted an order to attach the husband where the order for payment of alimony had been made by consent. If the objection were allowed to prevail the proper and perhaps the only effectual means of enforcing an essential part of the final decree would be taken away in every case where an order for payment of and not for securing permanent alimony, had been made and was not appealed from. I overrule this objection. It was further objected that the court has no jurisdiction under Section 87 to make an order like the present for the payment of money only, and that the order should have been one to secure the wife a gross or an annual sum of money. The case of *Medway v. Medway* 7 P.D. 122 which seems to favor this view was a case decided on appeal. But it was pointed out in *Stephen v. Stephen* that the form of the order was condemned in that case; that the jurisdiction of the court over the subject matter was not disputed, but that the order was held to be wrong because it directed payment, not security, as allowed by Section 87. In the present case the decree has not been appealed from and the objection cannot prevail on an application for attachment. It has been also contended that the decree is bad for not fixing the duration and dates of payment and because it names lunar instead of calendar months. The duration of payment is sufficiently indicated, in my opinion, by the use of the terms "permanent alimony" to be limited in the case of the petitioner to the joint lives of the petitioner and respondent. The intended periods of payments appear, though not very clearly, to be on the first day of every lunar month, beginning with September 8th 1891. No reason has been assigned why the court should not, if it thought fit, order payment to be made by the lunar month instead of by the calendar month. These last two objections, however, are not open to the respondent on the present motion, though they might have been taken on appeal from the decree. Defects in an order not appealed from in a matter in which the court has jurisdiction cannot be relied on as an answer

to a proceeding to enforce an order. I therefore disallow all the preliminary objections. I have already intimated that in my opinion no answer has been made by the respondent on the merits of the motion. The motion will be granted, with costs to be taxed and paid by the respondent to the petitioner's proctor. The order for attachment will not issue if within two clear days from this date the respondent pay to the petitioner's proctor the full amount of alimony in arrear.

Solicitors for petitioner, *Gaunson and Wallace*; solicitor for respondent, *W. H. Peers*.

IN CHAMBERS.

(Coram a'Beckett, J.)

HUMBERSTONE AND ANOR. v. MINCHIN.

18th Dec., and 8th Feby.

Rules of Supreme Court 1884 Order III r. 6—Order XIV r. 1—Promissory note—interest—special indorsement—a claim in a writ for interest on a promissory note does not deprive the plaintiff of the benefits of a specially indorsed writ; and therefore the plaintiff can apply for judgment under Order XIV r. 1.

Application on behalf of the plaintiff for leave to sign final judgment under Order XIV. r. 1.

The writ was indorsed as follows:—

Statement of Claim.

The plaintiffs claim is against the defendant as maker of a promissory note for £36 10s. 6d. dated the 5th day of March, 1890, payable six months after date in favor of the plaintiffs; and as maker of a promissory note for £64 11s. 6d. dated the 15th day of August, 1890, payable three months after date in favor of the plaintiffs and of which two promissory notes the plaintiffs are the holders.

Particulars.

	£	s.	d.
Principal sum due on the first above-mentioned promissory note	36	10	6
Principal sum due on the second above-mentioned promissory note	64	11	6
	£101	2	0
1891	£	s.	d.
January 15th paid	40	3	6
May 2nd paid	4	4	4
	56	14	2
Interest	6	1	7
Amount due	£62	15	9

Mr. Pigott in support.

Mr. Anderson to oppose. There is a preliminary objection. The action is brought on a promissory note and interest is also claimed; this claim for interest is in the nature of damages and is therefore not the subject for special indorsement. *Hood J.* in *Coane v. Thomas Bent Land Company* 12 A.L.T. 182 has decided that a claim for interest in an action for work and labor done and for money paid is in the nature of damages and not the subject of special in-

dorsement. In *Rodney v. Lucas* 10 Ex. 667, the court decided that, in all cases, except those on bills of exchange and promissory notes; if the plaintiff by his indorsement claimed interest where it was not due on a contract express or implied and signed judgment on default of appearance the judgment would be set aside. The interest there was only allowed because it was the practice of the court. In *Webster v. British Empire Mutual Life Assurance Company*, 15 Ch. D. 169, *Cotton L.J.* at pp. 175 176 lays it down that interest on a promissory note is in the nature of damages and must go to the jury to assess the amount. Sec. 58 of the "Instruments Act 1890 also provides that interest may be allowed as liquidated damages but may be withheld wholly or in part. The power to give or withhold clearly shows that the interest is not part of the debt and therefore must be damages.

Mr. Pigott. By sec. 207 of the "Instruments Act 1890, interest, if the rate be not agreed upon is 8%, sec. 58 allows interest as the measure of damages, and as liquidated damages. This brings the claim for interest within order III r. 6, Interest properly the subject of special indorsement, and therefore recoverable under Order XIV, usually arises by express contract; it is also sometimes given by particular statutes, e.g., the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61 ss. 9 (3), 57 Unless expressly made payable on the face of the instrument, interest on a bill of exchange or promissory note can only be claimed by way of damages (exp. *Charman, W.N.* (87)184), but those damages are by the Act of 1882, to be deemed liquidated damages (s. 57 (2) (b), and as such fall within the wording of rule 3 (Order VI). See *The Annual Practice* 1890, 1891 p. 203. Interest is also included in the forms given in App. c. sec. IV. Nos. 3, 4, 5, & 7. Reference was also made to *Chalmers* on bills of exchange 4th ed. p. 191.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—An application for summary judgment under order XIV. in an action on promissory notes. It is objected that the writ cannot be regarded as specially endorsed, because it concludes:—"The plaintiffs also claim interest on £56 14s. 2d., being the balance due on the said promissory notes at the rate of £8 per centum per annum from the date hereof to the date of signing judgment by virtue of the provisions of the Instruments Act 1890, by virtue of which also the interest above stated is claimed." It appears that a claim of this character is usual, and does not deprive the claimant of the benefits of special endorsement, and, following what I believe to be the practice on the subject, I treat this writ as specially endorsed. An affidavit in answer makes out a case for counter claim to some extent connected with the claim sued on. I order judgment to be entered for the amount of the claim and costs, but execution not to issue until the counter claim has been disposed of. I give the plaintiff £3 3s. costs of the summons, defendant to abide his own costs. Certify for counsel.

Solicitors for plaintiffs, *Smith, Emmerton and Johnson*; for defendant, *Turner and Ham.*

Before Hood, J.

GILL V. METROPOLITAN BANK LIMITED.

29th December.

Rules of Supreme Court 1884 Order XIV r. 1—vacation—In vacation a judge has no power to entertain an application for final judgment under Order XIV r. 1.

Application on behalf of the plaintiff to leave to sign final judgment under Order XIV. r. 1. A preliminary objection was taken that such an application could not be made in vacation unless by consent.

HIS HONOR said:—I think the matter is too clear for argument. I think I ought to have power to entertain an application of this nature but nevertheless I think such an application is clearly not within the rules. By Order LXIV. r. 5* of the rules of 1884 it was provided that certain business could be taken in vacation; then in 1885 that rule was repealed and the power of a judge in vacation to hear matters was extended to certain other cases over which he had no power under the old rules. The new rule, however, is silent as to applications under Order XIV. r. 1. I therefore think I have no power to hear an application for final judgment in vacation and will adjourn the summons until 1st February 1892.

Solicitors for plaintiff *Yencken and Shuter*; for defendants *Malleson England and Stewart*.

Coram Hood J.

HUGO V. HUGO.

26th February.

Marriage Act 1890 (No. 1166) sec. 111—a wife has to satisfy the Court that she has not sufficient separate estate to bring herself within the provisions of sec. 111.

Application under sec. 111 of the *Marriage Act 1890* on behalf of the petitioner in a divorce suit for an order that her husband the respondent should be ordered to pay into Court a sum of money sufficient to enable her to have the merits of her case investigated by a proctor.

Mr. Forlonge in support.

Mr. Walker to oppose.

HIS HONOR said:—It has been contended on behalf of the respondent that sec. 111 only applies where it appears that the wife has not sufficient separate estate to have the merits of her case investigated by a proctor. If this contention, however, were correct and it was shown that the wife was possessed of a small sum of money sufficient for this purpose (say £5) she could not take advantage of this section and might have to bear the whole costs of the suit, and this in my opinion was not the intention of the legislature. Under this section the case of the husband always being wealthy seems to be contemplated; but at the same time the wife has to satisfy the Court that she has not sufficient separate estate to bring her within the section. The

petitioner in the present case has not so satisfied me and I therefore refuse to make the order sought.

Proctors for petitioner *Kane*; for respondent *Smart and Walker*.

(Coram Hood, J.)

IN THE WILL OF DIXSON.

26th Feb.

Administration and Probate Act 1890 (No. 1060) sec.

23—*Trial by jury—It lies on the applicant to show by affidavit that there is a question of fact fit to be tried by a jury—The mere assertion that the mental capacity of the testator will be in dispute does not necessarily constitute such a fit case—Semble—It is for the judge at the trial to order that the matter should be heard before a jury if he think fit.*

Application on behalf of the caveators under Sec. 23 of the *Administration and Probate Act 1890*, that the question of fact as to whether the testator was of sound testamentary capacity at the time of the execution of the will, should be tried by a Judge sitting with a jury.

Mr. Coldham in support.—There is a question of fact involved in this matter as to whether the testator was of sound mind at the date of the execution of the will. This should be determined by a jury.

Mr. Topp, for the executors, to oppose.—No question of fact has as yet arisen. This question can only arise at the trial, and then it is for the judge, if he think fit, to direct a jury that the question of fact be tried by a jury.

HIS HONOR said.—I think there are two reasons for refusing this application. In the first place Sec. 23 provides that the Court may, *if it think fit*, cause the question of fact to be tried by a jury. It lies on the applicant to show by affidavit that there is a question of fact fit to be tried by a jury. In the present case the applicants merely say that there has been a caveat lodged, and that the testamentary capacity of the testator will be in dispute, and that therefore this is a fit case to be tried by a jury. If that contention be correct then in every cause where a will is attacked on the ground of mental incapacity the matter must go to a jury if either party asks for a jury. I do not think that the mere assertion that the mental capacity of the testator will be in dispute necessarily constitutes a fit cause that that question of fact should be tried by a jury. I therefore refuse the application. Although it is not necessary for my decision I think in the second place that an examination of the arrangement of the sections 20 to 23 inclusive bears out the argument of *Mr. Topp*, viz. :—that the provisions of sec. 23 are intended for the assistance of the judge at the trial in case he should desire the assistance of a jury to try any question of fact. Sec. 20 deals with the service of the order *nisi*. Sec. 21 provides that if the caveator does not appear on the return day the order *nisi* may be made absolute upon an affidavit of service. Sec. 22 that on the hearing the parties may verify

their respective cases by affidavit. Then sec. 23 provides that where any question of fact arises then the Court may cause the same to be tried by a jury. From this I think it is evident that it was intended that it is for a judge at the trial to order a jury if he think fit. Although I think that this is the correct interpretation to put on these sections I must not be taken as deciding the present case upon that interpretation. I refuse the application. Costs to be in the cause. I certify for counsel.

Proctors for caveators *Moule and Seddon*; for the executors *Braham and Pirani*.

PRACTICE COURT.

(Before Hood J.)

IN RE FRANK BELL.

Marine Act 1890 (No. 1165) ss. 177, 183 (2)—Evidence Act 1890 (No. 1088) sec. 53 certiorari—Service of a copy of the answers and of the judgment of the court is a sufficient compliance with the provisions of sec. 177—sec. 183 gives the court power to find a person guilty of gross misconduct—An investigation by the court does not come within the provisions of the Evidence Act 1890 and therefore the person charged is a competent witness in his own behalf—when certiorari will be granted.

Rule nisi for a writ of certiorari to bring up the proceedings of the Marine Court in connection with the suspension by that Court of the certificate of Captain Frank Bell for a period of nine months.

Mr. Mitchell moved the rule absolute.

Mr. Box and Mr. Woinarski showed cause.

HIS HONOR said I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:—In the month of October last the Court of Marine Inquiry held a formal investigation, under the provisions of the Marine Act 1890, into a charge of misconduct that had been preferred against Frank Bell, formerly master of the ss. *Gambier*. The finding of the Court was that the charge had been sustained, and that the misconduct amounted to gross misconduct, and Mr. Bell's certificate was suspended for nine months, and he was ordered to pay costs. Subsequently an order nisi was obtained by Mr. Bell calling upon the said Court and the members thereof to show cause why a writ of certiorari should not issue to remove their determination into this court with a view of quashing the same. There are four grounds set out in the order nisi, but the first was abandoned at the argument. The others were as follows:—

(2) "That no copy of the report, nor of the preliminary inquiry, nor of the statement of the case, upon which the said formal investigation into the said alleged charge was ordered, was furnished to the said Frank Bell, within the meaning of section 177 of the Marine Act 1890. The document served upon him purporting to be a copy of the 'report' within the

meaning of the said section." (3) "That the formal investigation having been merely directed to be held for the purpose of making an inquiry into a charge of misconduct in the navigation of the ss. *Gambier* against the said Frank Bell, that there was no jurisdiction in the said Marine Court to find the said Frank Bell guilty of 'gross misconduct' within the meaning of section 183 (2) A of the said Marine Act 1890, and that the mere default in navigation could not be 'gross misconduct' within the meaning of the said section." (4) "That the said Marine Court refused to allow the said Frank Bell to be sworn as a witness and give evidence, as a sworn witness on his own behalf."

The second ground is founded upon section 177 of the Marine Act 1890, which provides that no certificate shall be cancelled or suspended unless a copy of the report, or of the preliminary inquiry, or a statement of the case upon which the formal investigation is ordered, has been furnished to the owner of the certificate before the commencement of the formal investigation. The facts are that in September, 1891, an investigation was held into the circumstances attending the collision between the steamship *Easby* and the ss. *Gambier*, at which Mr. Bell was present as a witness, and to which he was a party, and at the investigation the representative of the Marine Board, in accordance with the rules, stated the questions upon which the opinion of the Court of Marine Inquiry was desired, and these questions were fully answered. A copy of these answers, and of the judgment of the Court, was served upon Mr. Bell, and it is contended on his behalf that this is not a compliance with the statute. But whatever the original of this document may be called, it was the foundation of the case against Mr. Bell, and was all that was before the board when the investigation was ordered. And if a copy of part of the notes of evidence given at an inquest be sufficient (*Exp. Ferguson*, L.R. 6, Q.B., at p. 287), I fail to see why this copy of the judgment and answers was not a compliance with section 177. The object of the section is to give the accused person notice of the charge about to be preferred against him, and this the document in question amply does. I think therefore, that this objection cannot be sustained. The third objection also in my opinion fails, as the finding of the Court seems to me to be directly covered by section 183 of the Marine Act. By that section, as I read it, the Court of Marine Inquiry is authorised to hold formal investigations into charges of misconduct, and then, if the misconduct is of a gross nature, the certificate may be cancelled or suspended. This, I think, clearly gives the Court power to find a person guilty of gross misconduct, and default in navigation might or might not be gross misconduct according to the evidence. There then remains the fourth ground. It appears that during the hearing of the case "the evidence of the said Frank Bell was tendered on his own behalf and as evidence which should be taken, but the said Court refused to allow the said Frank Bell to be sworn," but "a statement was then made by the said Frank Bell, and such statement was taken down and subscribed by him." It is now contended that the Marine Court was wrong in refusing to allow Mr. Bell to be sworn. With this argument I am inclined to agree, because my present impression is

that this case is not covered by section 53 of the Evidence Act 1890, and that therefore Mr. Bell would have been a competent witness. But it was conceded in argument that this order ought not to be made absolute if, upon the return of the writ of *certiorari*, the proceedings would not be quashed, and therefore, assuming that this objection is valid, it becomes necessary to consider how far it affords any ground for quashing proceedings upon *certiorari*. The proceedings themselves being regular upon their face and the objection only appearing by affidavit. As there is no statutory provision preventing the removal by *certiorari* of the decisions of this Marine Court, Mr. Bell has his common law rights—that is the right of every suitor to appeal to this Court to keep the Court of inferior jurisdiction within the limits of its authority. (See *re Sullivan*, 22 L.R., Jr., Q.B., 119.) But it is a general rule that this Court will not on *certiorari* notice objections (except for want of jurisdiction) raised upon affidavit and not appearing on the face of the proceedings (*Stone* 118 *Reg. v. Cambridgeshire*, 4 Ad. and El. 111) for a *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction has exceeded its bounds. (*Reg. v. Morley*, 2 Burr, 1,042.) And where the legislature has trusted the original (or it may be, as here, the final) jurisdiction on the merits to the Court below all that this Court can do is to see that the case was one within the jurisdiction, and that the proceedings on the face of them are regular and according to law (*Reg. v. Bolton* 1 Q.B., 166). The objection, therefore, if raised on affidavit, must go to the jurisdiction. Mere error or mistake will not be sufficient. Thus misdirection is no ground for *certiorari* (*Reg. v. Christian*) 12 L.J. M.C. 26; *Reg. v. Ingham*, 5 B. and S. 257; *Reg. v. Steward*, 9 Q.B.D. at p. 748; nor is the fact that a coroner has received unsworn statements (*Reg. v. Ingham*.) There must be something disclosed that destroys the power of the inferior Court to make the order complained of before this Court will interfere on *certiorari*. And as the only effect of the statutory privative provisions with respect to *certiorari* is to prevent objections to technical defects appearing on the face of the proceedings (*Reg. v. Chantrell*, L.R., 10 Q.B., at p. 589), leaving untouched the power of this Court to interfere in cases of manifest want of jurisdiction or manifest fraud, it follows that where *certiorari* is not taken away by statute and where the proceedings are regular on their face, the power of this Court only extends to ascertaining whether the tribunal had jurisdiction assuming the facts alleged in the information to be true (*Reg. v. Bolton*.) In the present case Mr. Bell was heard in his defence through his solicitor, and made his statement; the Court was a competent tribunal having jurisdiction over the subject matter of the inquiry; all conditions precedent had in my opinion been complied with; and no facts were proved during the hearing that could prevent the Court from making, upon sufficient evidence, the order which it did make, so there was therefore no want of jurisdiction upon which to found *certiorari*. *Colonial Bank v.*

Willan, L.R. 4., P.O. 417.) The refusal to swear Mr. Bell as a witness was no more, in my opinion, than an error or mistake, and, as has been frequently pointed out, an error or mistake does not necessarily take away jurisdiction. As therefore I think none of the grounds of this order have been sustained it will be discharged with costs. I have not formed any definite opinion upon the other point raised in opposition to this order, viz., that it is a matter of discretion with this Court to issue *certiorari*, but if there is any discretion I would not exercise it in Mr. Bell's favour inasmuch as the objections raised, even if well founded do not show that Mr. Bell has or could have suffered the slightest injustice from them.

— — —
Before Hood, J.

— — —
EX PARTE MILLER AND GRAY.

— — — 19th, 24th Feby.

Stamps Act 1890 (No. 1140) ss. 70, 71, 93, 97—Re-transfer—stamp duty—a retransfer by a purchaser to a vendor on the failure of the purchaser to complete his purchase is not liable to stamp duty.

Case stated by the comptroller of stamps for the opinion of the Supreme Court under sec. 71 of the *Stamps Act 1890*.

The facts appear sufficiently from the judgment.

Mr. Mitchell for Miller and Gray.

Mr. Box for the comptroller of stamps.

HIS HONOR said—I will consider the matter.

HIS HONOR on a subsequent day read the following judgment—By a contract made in April 1888 James Miller and Alexander Gray sold certain lands in South Melbourne to the Investment Coy. of Victoria Limited for £100,000. In pursuance of this contract about £20,000 of the purchase money was paid and the land was transferred to the purchasers, who thereupon mortgaged the property to the vendors to secure the due payment of the balance. In Sept. 1891 a deed was executed between the vendors and the purchasers by which (after reciting that £78,000 of the purchase money remained unpaid and that the Company was desirous of not proceeding further) the parties agreed, that the contract should be cancelled and put an end to, upon the terms, that the vendors should retain all moneys paid, and that the company should execute all documents necessary to re-vest the land in the vendors. In pursuance of this agreement and to give effect thereto the company re-transferred the property to Miller and Gray on the 3rd September 1891 or in other words the purchasers forfeited all moneys paid, the contract was cancelled and the property restored to its original owners. Upon this the Collector of Imposts or Comptroller of Stamps was requested by Miller and Gray to express his opinion under the 70th sec. of the *Stamps Act 1890* as to whether any, and if any, what amount of duty was chargeable on the re-transfer. The collector thereupon expressed his opinion to the effect that inasmuch as the property transferred was in satisfaction of a debt due by the

company to Miller and Gray the transfer was chargeable with duty under sec. 97. Miller and Gray being dissatisfied with this opinion a case has been stated under Sec. 71 by way of appeal to this Court. By the *Stamps Act* an *ad valorem* duty is chargeable on a "conveyance or transfer on sale of any real property" and by sec. 93 this expression is defined as including every instrument, whereby, any property upon the sale thereof, is legally or equitably transferred to, or vested in, the purchaser. By sec. 97 it is enacted that when any property is conveyed to any person in consideration, wholly, or in part, of any debt due to him, such debt is to be deemed the whole or part (as the case may be) of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty. For the collector's view it was first argued that sec. 97 covers this case and itself imposes a duty on this transfer. With this contention I do not agree. Sec. 97 in my opinion is merely in aid of the general power of taxation, by affording a mode of estimating the duty in cases of executed considerations. It does not of itself create any obligation to pay duty. It pre-supposes a document liable to duty and then directs how that duty is to be ascertained viz. :—by including the amount of the past debt in the consideration upon which the *ad valorem* duty is assessed. The main argument, however, turned upon the contention that this dealing with the land was a "sale" within the meaning of sec. 93. The retransfer of the land was clearly a passing of the property for a valuable consideration and if the word "sale" is to have this extended meaning the document was liable to duty. But in construing an Act of Parliament the words should, as a rule, be interpreted according to their ordinary sense. (*Cull v. Austin* L.R. 7 C.P. at p. 234) and taxes or charges on the subject should be imposed in clear and unambiguous language (*Commissioners of Revenue v. Angus* 23 Q.B.D. at p. 589). Taking therefore the common meaning of the words, is this case plainly within the Statute? The answer to this depends greatly upon the meaning to be given to the word "sale." Every sale includes (1) an agreement or a bargain, (2) the payment of the price and (3) the delivery or the conveyance of the property. In its ordinary meaning "sale" implies a transfer of the property in a thing for a price in money and is so distinguished from "exchange" or "barter" (*Benjamin on Sales* 1) and in common parlance a seller disposes of his lands at an adequate price which the purchaser pays (*Denn v. Diamond* 4 B and C at p. 245.) The contention that the word "sale" infers a price in money in sec. 93 of the Stamps Act receives support, not only from the fact that such is the natural meaning, but also from looking at secs. 95, 96, and 97 of that Act. By these secs. the legislature has provided for cases of sales where the consideration is not the payment of money in the ordinary sense and those secs. would be unnecessary if the extended meaning argued for on behalf of the Collector of Imposts were correct and it is also to be noticed that sec. 78 of the English Act 33 and 34 Vic. c. 97 which imposes a duty upon conveyances other than those on sale or mortgage has not been

enacted in Victoria. I think, therefore, that "sale," in sec. 93 of the Stamps Act means a sale for money. This disposes of the more extended argument for the respondent but it does not determine the matter, for it leaves untouched the point, as to this case being a sale for a past consideration within sec. 97. But in my opinion before sec. 97 can apply there must have been a sale of property so as to cause the duty to attach, and the real question is was this a "sale of any real property." To determine this matter it is not sufficient to look only at the form into which the parties have thrown their dealings for in order to decide whether duty is payable or not the substantial matter of the agreement is alone to be looked to (*Christie v. Commissioners of Revenue*, L.R., 2 Ex. 50; *Jamieson v. Renwick*, 17 V.L.R. 124.) Now the substance of the transaction between the parties here was not the sale or re-sale of this property. The bargain or agreement was not in substance about the sale of anything but about the cancellation of the original contract. That cancellation involved no doubt, the return of the property and the giving up of a past debt but the transfer of the property was not made by reason of any sale but was incidental to the cancellation and I cannot think that the land was sold or re-sold or that Miller and Gray can reasonably be called purchasers thereof. It is said that this view leads to an evasion of the Act. I do not think it does for I do not think that an Act of Parliament can be evaded in the sense suggested. I prefer to say that the case is not within the Act and that therefore the document is not liable to duty. This being my opinion I accordingly determine that the assessment was wrong and I order that the Comptroller of Stamps repay to the appellants the amount of duty paid by them together with the costs incurred by them in relation to this appeal.

Solicitors, for Miller and Gray, *Smith, Emmerton, & Johnson*; for the Comptroller, the *Crown Solicitor*.

Before Hood J.

IN RE AGNES HARLEY.

23rd February.

Certiorari—Coroner's Court—The Supreme Court has power to grant certiorari where irregularities appear on the face of proceedings of a Coroner's Court.

Rule nisi for a writ of *certiorari* directed to the Acting City Coroner calling upon him to show cause why the finding of the jury on the inquest of Agnes Harley should not be quashed on the ground that it was inconsistent and bad on the face of it.

The finding of the jury was as follows—

"We find that the deceased, Agnes Harley, died on the 6th of January, from hæmorrhage and collapse, due partly to loss of blood and partly to the difficulty in delivering her. We exonerate the other medical men, but we find Dr F. Newick guilty of neglect in leaving the deceased between the hours of 12 and 3; but we do not find him guilty of manslaughter."

Mr. Mullen moved the rule absolute.

Mr. Box shewed cause. The grounds of the order nisi are—

(1.) That the finding of the jury was irregular, de-

fective and inconclusive and the inquisition is bad in law on the face of it, and (2) that there was no evidence of neglect on the part of Dr. Fenwick to go to the jury. The finding is that the woman died partly from loss of blood and partly from difficulty in delivering her. The rest is surplusage and is a matter for amendment and does not make the finding bad. If the rule were now up the finding would not be quashed on the ground that it was good in part and bad in part. He referred to *Jarvis on Coroners* 5th Ed. pp. 41, 91; *Comber on Coroners* p. 386; and *Sewell's Coroner* 3rd Ed. pp. 201-2.

Mr. Mullen.—The finding of the jury is inconsistent on the face of it and ought not to have been received by the coroner. If there had been any neglect the jury should have found manslaughter, if not then they ought not to have touched the subject at all. The Court will set aside a coroner's inquisition for defect apparent on the face of it. *In re Culley*, 5 B. & Ad. 230. He also referred to *Jarvis on Coroners* 4th Ed 289.

HIS HONOR said—The object of granting a *certiorari* is that this Court may exercise a control over courts of inferior jurisdiction. *Certiorari* is granted for two reasons: one is for preventing the bounds of the jurisdiction of an inferior court being exceeded, and the other is for correcting defects upon the face of the proceedings. In some cases *certiorari* for correcting technical defects on the face of the proceedings is taken away by statute. In this case the statute does not touch the coroner's court and therefore the power of this Court to grant *certiorari* where irregularities appear on the face of the proceedings is not taken away. In this case it is objected that the finding of the jury was wrong on the face of it. The jury were sworn to find where, how, when, and by what means the deceased came by her death. They find that she died of hæmorrhage and collapse after childbirth, and then they go on to say that they exonerate the other medical men but find Dr. Fenwick guilty of neglect, but that they do not find him guilty of manslaughter. It is objected, and I think rightly, that this latter part of the finding is repugnant and inconsistent with the other part. In considering the cause of the death of the deceased the jury had to consider whether the death was caused by neglect. If the death was caused by neglect, then that was manslaughter; but to say in one breath that the death was caused by neglect on the part of the medical attendant and then to say that such neglect did not amount to manslaughter is a repugnant and inconsistent finding. The neglect found here may mean that the jury considered that there was some kind of neglect or other, but that it had nothing whatever to do with the death of the deceased. If the neglect had nothing to do with the death, then the jury had no right to touch it. I think the *certiorari* ought to go in this case. I have not in this application to consider whether this is a matter for amendment or not; that can be dealt with when the inquisition is brought up. I will order the *certiorari* to go, returnable this day week.

Solicitors: for Dr. Fenwick, *Fay*; for the Acting Coroner, *The Crown Solicitor*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., Hood and Molesworth J.J.)

BALLANTYNE v. MUTUAL INSURANCE CO. OF N. YORK.

Dec. 1, 2, 4, 7, 8, 15, 23.

Insurance.—Policy—"Die by his own act"—Estoppel. The representative of B, an insured, brought an action against the insurance company based upon a certificate or interim note of insurance on the life of B, dated 5th September, 1890, for the sum of £2,500, for the term of 4 months until 5th January, 1891. The application for the policy which was made by the certificate a part of the policy included a warranty by the insured that he would not die by his own act during a period of 2 years. Held, that the word "act" mentioned in the warranty, consisted of (1) an intent in the direction of an object known and understood (2) of will (3) of a movement of the body conformable to the object intended and resulting directly from the exercise of the will.

If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist.

Appeal from A'Beckett J.

[The facts and arguments are fully stated in the Judgments of the Court and in the report of the case in the Court below. See 13 A.L.T. 25.]

Mr. Isaacs (with him *Mr. McArthur*) appeared for the plaintiff.

Dr. Madden and *Mr. Higgins* appeared for the defendant company.

Cur. ad. vult.

Mr. Justice MOLESWORTH, dissentiens, said,—The Court is called upon to deal with a motion for a new trial of the action on the grounds that the finding of the jury as to the second and third special questions put to them by the learned judge who tried the action is against evidence and against the weight of evidence and the court is also called upon to deal with an appeal from the judgment of Mr. Justice A'Beckett, delivered on the 20th July, 1891. It is unnecessary for me fully to state the facts; they will be fully stated by the learned Chief Justice. I am of opinion that the judgment of Mr. Justice A'Beckett is correct on the findings of the jury. The question on which I differ from the other members of the Court is whether the verdict of the jury should be allowed to stand or not. In my opinion there should be a new trial, for the reasons I am now about to state. The action was brought by the wife of David Ballantyne to recover a sum of £2,500 on a certificate of life assurance dated 5th September, 1890. The first answer to the action

was that David Ballantyne, in his proposal or application for insurance, warranted that he would not die by his own act," and that he broke that warranty by shooting himself. David Ballantyne was found dead on the morning of the 8th October, killed by the discharge of a gun into his head. The jury found that he shot himself, and that he did not accidentally shoot himself. According to the evidence he must have taken the gun out of its case, put it together, loaded it, and then, at a place some distance from his house, discharged it into his head. The jury by their answers to questions 1 and 4, find that in so doing he voluntarily and intentionally pulled the trigger of a loaded gun presented at his head. They must be taken, in my opinion, by these answers to have found (1) that he had a sufficient power of mind and reason to have known that pulling the trigger would discharge the loaded gun, and (2) that he intended to so discharge it. But they, by a majority of five sixths, also found in answer to question No. 3, that he was so insane as not to know that firing the gun into his own head would kill him. That is, that he had not sufficient power of mind and reason to understand the physical nature and consequences of pulling the trigger of a loaded gun placed to his head. If Ballantyne had shot some other man instead of himself, and all the evidence that was given in this action had been given as to Ballantyne's delusions, I do not think it could be successfully argued that the other man did not die by Ballantyne's "act"—though "perhaps" Ballantyne, on his trial for murder, might be found not guilty on the ground of insanity if the jury thought his delusions had so affected his mind that he did not know he was doing a wrongful act in shooting the other man. In my opinion a man must be taken to intend the natural (and in this case certain) results of firing a gun into his own head till the contrary is proved; and, as in this case it is clear that Ballantyne intentionally fired the gun, it was, I think, for the plaintiff to prove that he did not know that firing the gun into his own head would kill him. I think the evidence is so unsatisfactory in support of the finding of the jury in answer to the third question put to them that the Court would not be departing from the principles upon which it has heretofore acted by setting aside the verdict in this case and granting a new trial on some of the questions raised in this action. I observe that Mr. Justice a'Beckett stated in his judgment that he would not himself have come to the same conclusion as the jury did on question No. 3, but that he was bound by their answer.

THE CHIEF JUSTICE said—We have heard arguments and we now proceed to deliver judgment on two motions in this case. The first is the motion that a new trial of the action be ordered on the ground that the findings of the jury as to the second and third questions put by the learned judge who tried the case are against evidence and the weight of evidence. The action is brought on a certificate or interim note of insurance, dated September 5, 1890, on the life of David Ballantyne, for the sum of £2,500, for the term

of four months until January 5, 1891, subject to the usual terms of the defendant company's policies. The application for the policy, which was made by the certificate a part of the contract, included a warranty and agreement by the insured that he would not die by his own act during a period of two years. The insured died by a gunshot wound in the head on the night of October 7, or the morning of October 8, 1891. The jury at the trial found that the deceased shot himself, and that he did not accidentally shoot himself. In answer to the second question, "Was he insane when he shot himself?" five out of six of the jurymen said "Yes;" and in answer to the third question, "Was he so insane as not to know that firing a gun into his own head would kill him five out of six of the jurymen answered "Yes." The warranty was set up as an answer to the action on the certificate. It was properly assumed for the purposes of this motion that in order that the death of the deceased should appear to have been caused by his own act it was necessary that it should appear not only that the deceased's death was caused by a movement of his own body, which produced death, but also that he knew that what he did was calculated to destroy his life. The question then which we have to determine is, was there evidence on which reasonable men could find that the deceased did not know that firing a gun into his own head would kill him? It appeared that for a few days prior to his death the deceased was under the influence of delusions brought about by an attack of *delirium tremens*, from which he was recovering. He was also suffering from want of sleep. He spoke and acted incoherently and wildly. On the day before his death he complained that there was something on his ear, and he cried bitterly. He also said several times on the same day, "I've three heads, a bell head, a bully head, and my own head, and there will be a click, and I will be all right." There was nothing apparently wrong with his ear, or with his head. It would undoubtedly be open to the jury to draw the inference from this evidence that the insured, being conscious of acute suffering from a real and also from imagined causes, intended to put an end to his life, and fired the gun in order to carry that intent into effect. But the jury might also, I think, not unreasonably infer that the insured, under the influence of these delusions, loaded and fired the gun in the belief that he could thereby remove the imaginary causes of his suffering, and in forgetfulness for the time that the certain effect of the discharge would be to deprive him of life. I incline to think, with the learned judge who tried the case, that I should not myself have drawn the latter conclusion, but I cannot say that a jury of reasonable men could not reasonably draw such a conclusion. The fact that he had expressed wonder, after reading about suicides, that any man should do such a thing, and the further fact that although he had sustained some losses in business he was in receipt of a good income and had good prospects, lend support to the view taken by the jury. I am of opinion, therefore, that the objections

taken to these findings have not been sustained, and that the motion for a new trial should be dismissed with costs. The motion by way of appeal from the judgment rests on two grounds. By the first the question is directly raised, I believe for the first time, as to the meaning of the words "die by his own act," in a warranty in an instrument of insurance. It is admitted that these words would not include a mere accident arising proximately from an extrinsic cause, and not from anything done immediately by the insured himself. But it has been contended for the defendant company, that these words include a case of death caused immediately by a movement of the body of the insured, although the insured did not intend to kill himself, and was ignorant that the immediate consequences of the movement of his body would be fatal. In illustration of this view and the meaning of the word "act" it has been suggested that if a perfectly sane person should meet his death by leaping from a window to escape from fire or in a fit of somnambulism, or by diving into shallow water supposed to be deep, he would die by his own act within the meaning of this warranty. According to this view the act connotes no mental action whatever. Every movement of the body, by whatever cause it may be produced, is an act of the living man. A person who, while wholly unconscious and suffering from convulsions, inflicted a death wound upon himself would die by his own act. Another meaning has been suggested, namely, that the word "act" in this connection means a muscular movement, the result of conscious will but not springing from and intended to produce the natural or necessary consequence of the movement. The instance is given of a lunatic who leaps into the sea and is drowned. The leap, it is said, is the manifest result of his will, and although he has no intent or thought of destroying his life, his life is lost by his own act. I do not think that either of these two meanings can be accepted as the true meaning of the word "act." We are bound to consider this word according to its natural and ordinary meaning. The application of the term to any of the events or occurrences, as they would be more properly termed which have been cited in this argument as instances, would not be consistent, in my opinion, with the ordinary meaning of the word "act." The primary meaning to the word in *Murray's new English Dictionary* is "a deed and performance of an intelligent mind." Austin, Jur. 18, I. 427, observes that—

"The only objects which can be called acts are consequences of volitions. The involuntary movements which are the consequences of certain diseases are *not* acts. . . . A voluntary movement is an act."

An analysis of the combined mental and bodily movements which constitute a man's act appears to supply a more accurate definition of the meaning of the word as it is commonly understood and used in speech. An acute and accurate thinker (Mr. Stephen), in his *General View of the Criminal Law of England*, p. 78, defines an "act" as consisting:—(1) Of an intent in the direction of an object known and understood; (2) of will; (3) of a movement of the body conformable to the

object intended, and resulting directly from the exercise of the will. He says:—

"In order that there may be any 'action' (a word which appears to be used by the author indifferently with 'act') at all, the will which causes, and the intention which co-ordinates bodily motion must always be present. The absence of both or either, would prevent the action from taking place at all, or reduce it from a action to a mere occurrence."

Now, if the word "act," as it is used in this warranty, includes, as I think that it does include, these three elements, intent, will, and bodily movement conformable with the object intended, the finding of the jury in this case determines that the insured did not die by his own act. The object intended by the sufferer was not death but relief. The movements of his body by which the gun was loaded and discharged, although produced undoubtedly by his will, were conformable with the intent to obtain relief and not with the intent to produce death. He did not, therefore, "die by his own act." The second ground of the appeal is founded upon the answer given to the fifteenth question contained in the application of the insured. It is not disputed that the answers to the question put to the insured are warranties, and not mere representations. But it is replied for the plaintiff that the defendants are estopped from saying that the written answer to this printed question is the warranty given by the plaintiff. Mr. Booth was the local manager of the defendant company. As such he was the general agent of the defendant company to receive proposals for insurance on behalf of his employers. When he is found so acting what is done by him ordinarily in the way of such insurance transactions must be presumed, until the contrary is shown, to be within the scope of his authority, *Bank of New South Wales v. Ouston*, 4 app. cas. 289. He states that he was in the habit of filling up proposals. The defendant company would be liable, therefore, for his fraud or his negligence as their agent in the act of reading the question and writing the answer of the applicant and they would be estopped from speaking the truth in the same circumstances in which their agent, if he were a principle instead of an agent, would be estopped. The principle on which estoppel of this kind rests is stated in *Carr v. London and N.W. Railway Company*, L.R. 10 C.P. 318:—

"If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

The American cases which have been cited—*Insurance Company v. Wilkinson*, 13 Wallace, 222, 3 Bigelow's Life Insurance, 810; and *American Insurance Company v. Mahone*, 21 Wallace, 152, 5 Bigelow's Life Insurance 567, apply established principles of English law to facts and circumstances of insurance agency cases in America not dissimilar to those of the present case, and confirm the opinion which we should have arrived at without them, namely, that the defendant company has failed to support its objection to the plaintiff's claim on this second ground

of appeal. We are of opinion that the learned judge's judgment is perfectly correct on both the points taken on this motion, and the appeal will be dismissed with costs.

Mr. Justice HOOD said,—In order to determine whether or not the verdict in this case can be supported it is, I think, necessary to consider, first, what is the correct meaning of the expression in the proposal "die by my own act." These words are very wide, but admittedly, they do not include cases where death is not the direct and proximate result of what is done, nor cases where death is caused by something done involuntarily. For instance, a man enters a railway carriage and is soon afterwards killed in a collision. Could any one seriously contend that he died by his own act? Or a man has an epileptic fit and, in consequence, falls from a height and is killed. Neither of these cases would come within the condition of this policy, and I think that the reason is because it is plain that death was neither intended nor foreseen, although in the one instance the deceased acted of his own will in entering the carriage, while in the other the movements which caused death were brought about by a superior power. So with death directly self-inflicted, but by accident—a man under the *bona fide*, but mistaken, belief that there is a balcony before an upstairs window walks out, falls, and is killed or a man breaks his neck by diving into shallow water thinking that it is deep, or he accidentally takes the wrong medicine and dies by poison. It would, in my opinion, be a perversion of language to say that death in any of these cases was caused by the man's own act and in none of them was there any intention to take life, nor any knowledge that death would ensue; and this I think, must be the test. Unless it is, it seems to me every case must be included, for I fail to see where else the line is to be drawn. But, indeed, where all intention and knowledge are absent I find it difficult to understand how there can be any "act." How can that be said to be a man's own act which he neither intended nor knew of? And what difference can there be when that absence of knowledge or want of intention is brought about by mental disease instead of by ignorance, mistake, or physical want of volition? In these cases the mind is not operating. In all of them death follows from the muscular movements of the assured, but there is no intention to cause death or knowledge that it will necessarily follow, and I can see no sound distinction between the involuntary movements of a man in a fit and the voluntary movements of one who neither knows nor intends the result of that which he does. In my opinion, therefore, this condition only applies to cases of self-destruction voluntarily and wilfully done with knowledge and intention. This view is, I think, supported by considering the object of the parties in making a policy and inserting this proviso. The insured person desires to secure the payment of a sum of money upon his death in the ordinary course, and this risk the insurers are willing to undertake. Their actuarial tables afford them a safe standard whereby to protect themselves, and the premium

can be calculated and fixed to meet the natural and usual causes of death. This being so, surely death by accident, whether directly brought about by something done by the insured himself or caused by another, or death caused while insane, may fairly be considered as of such common occurrence as to have been in the contemplation of the parties when the policy was made, and also to be a risk against which the company could provide. But no calculations will protect against fraud and wilfulness, and accordingly a proviso is inserted which I think is aimed at such cases and at such cases only, and that this is so seems to me to be shown by the fact that it is limited in its operation for two years. If the condition were intended to relieve the company from liability in every case in which the assured caused his own death, no matter in what way it was caused, why should not the condition be co-extensive with the duration of the policy? No reason could be suggested in argument why the company should agree to insure against a man accidentally killing himself after two years, and yet exclude it during that period. The risk of such a death does not decrease by lapse of time, nor is it more imminent at one time than at another. If the condition, however, is only aimed at a wilful or fraudulent taking of life there is a very plain meaning in the two years' limitation, for the company may well be content to take the risk of such an action on the part of a man who shows his *bona fides* by paying the premium during that period. I think, therefore, that the meaning I attach to these words is the correct one, and also carries out the intention of the parties. This being so, does this case fall within this definition? Have facts been proved from which reasonable men might infer that Mr. Ballantyne when he killed himself was in such a state of mind that he did not voluntarily, intentionally, knowingly, or wilfully kill himself? It appeared that he was under delusions as to his physical condition; that he imagined that there was some extraordinary peculiarity about the interior of his head, and that he suffered greatly from sleeplessness. He also thought he saw and heard impossible things, and his mind was undoubtedly weakened by disease. No motive was proved or suggested that would induce him to deliberately take his life except want of sleep, while, on the other hand, his delusions might have caused him to believe that the discharge of the gun would not kill him, but would merely cure him of his ailments. The jury accepted this latter view, and with their decision we ought not to interfere, whatever our individual opinions may be, unless we are satisfied that it is manifestly wrong. Remembering this, I am unable to say that was an unreasonable verdict. The delusions which possessed Mr. Ballantyne were of such a nature that reasonable men having to form an opinion as to the state of his mind might fairly come to the conclusion that he neither knew nor intended the necessary result of which he was doing, and I therefore agree with the Chief Justice that a new trial should be refused and this appeal be dismissed with costs. I have already ex-

pressed my view as to the meaning "die by my own act," so that I need say nothing further on this point in the second appeal. But a further question was here raised. Upon making his application for insurance, Mr. Ballantyne transacted the business with Mr. Booth, who was the manager in Victoria for the defendants. Following his usual course of business, Mr. Booth read over certain questions in the printed proposal, but one of them he read in a way different from that in which it appeared on the paper. According to the way in which it was read Mr. Ballantyne answered it correctly. According to the way it was printed the answer was not true. This answer was written down by Mr. Booth opposite the question, and the paper was signed by Mr. Ballantyne, and as it amounted to a condition or warranty the defendants now contend that this being false the plaintiff cannot succeed. To allow this contention to prevail would, to my mind, be to allow a gross fraud. It would be to enable the defendants to avail themselves of the mistake caused by the neglect of their own manager. It was said that the defendants cannot be held responsible for the mistake made by Mr. Booth. I think they can. He was their agent appointed to manage their business, and between them and the insured any loss caused by the mistake of Mr. Booth ought justly to fall upon those who employed him (see *Arnold v. Cheque Bank*, 1 C.P.D., 587, per Coleridge, C.J.). It was strongly urged for the defendants that the plaintiff cannot sue upon the contract and at the same time disavow one of the conditions of it. This same argument was put forward in *Wood v. Dwarries* (11, Ex. 493, 25 L.J., Ex. 129). That was an action on a life policy, and the defendants pleaded that the policy was made upon the express condition that any false statement in the proposal should make the policy null and void, and that there was therein a false statement. To this the plaintiff replied on equitable grounds that the defendants had, before the policy, published a prospectus stating that all their policies would be indisputable except in case of fraud. This replication was held good, and Martin, B., said to counsel for defendants, "You have no right to set up such a defence as this after having stated that you will not dispute except in case of fraud. It is a kind of estoppel." I think that the same principle applies to the present case, and that the defendants are estopped from setting up this alleged breach of warranty in answer to the plaintiffs' claim (and see *Wheulton v. Hurdisty*, 8 E. & B. 232; 26 L.J., Q.B. 265). It was further said that Mr. Booth was not the agent of the defendants so as to bind them by a contract containing conditions different from those in the printed proposal. It is to be remembered that Mr. Booth was local manager in Victoria, and I can find no direct evidence that he had not power to vary these printed questions, at all events, in the *ad interim* policies. It is clear as to some of the questions in the proposal that no definite answer might be possible. There are things asked about which the assured might well be ignorant. Is the manager to have no discretion in cases of that kind? and if he has in some cases why not in all? It

is said that the Sydney office managed everything, but that is only an inference, and it certainly was never made public. But, apart from this, there seems to me another sufficient answer, *i.e.*, Mr. Booth did not vary the conditions. The plaintiff is entitled to sue upon the policy and proposal as they stand, and the defendants are estopped from setting up any breach of the warranties in the proposal when such breach has been caused by the misconduct of themselves or their agent. So that no variation of the written contract is set up by the plaintiff, but the defendants are prevented from alleging that the written contract has been violated, and from taking advantage of that which was really their own wrongdoing. For these reasons I think this appeal also fails, and should be dismissed, with costs.

Solicitors—For plaintiff (respondent) *Lazarus*; for defendant (appellant), *Lynch, McDonald Stillman and Keep*.

SUPREME COURT SITTINGS.

(Before a'Beckett, J.)

RE GOODISON.

Feb. 9.

Police Offences Act 1890—Who may be informant—Penalty—See Sargood v. Veale 13 A.L.T. 121.

Order to review.

Mr. Lewis appeared to move the order absolute.

No appearance to show cause.

A'BECKETT J.:—Motion to make absolute an order to review a decision by which a penalty was imposed for resisting a police constable in the execution of his duty. The informant was not a policeman or connected with the police but a person interested in the performance of the duty which the defendant resisted seizure under a distress. The ground on which the order *nisi* was obtained was "That the informant could not lawfully be the informant in the case." There was no appearance to show cause against making the order absolute. The case appears to me to be governed by the recent decision of the Full Court in *Sargood v. Veale XIII. Australian Law Times 121*. According to the law and for the reasons there stated the informant in this case was competent to prosecute. I therefore discharge the order *nisi*, without costs.

Solicitor in support *H. H. Buad*.

(Before Hood, J.)

HANTRIVE V. HIRSCH.

Feb. 10, 11.

Order to review—Insolvency Act 1890 s. 70 subs. 5—Reputed ownership—Question of fact.

The doctrine of reputed ownership only applies when goods are held in such a situation as to convey to

persons exercising reasonable judgment the belief that they are the property of the insolvent when in possession of them, which is always a question of fact.

Order to review.

The facts appear in the judgment.

Mr. Leon appeared to show cause.

Mr. Pennefather appeared to move the order absolute.

Cur. adv. vult.

Rule nisi to review under sec. 141 *Justices Act* 1890. The complainant sued in the Police Court to recover certain goods value £15 alleged to be wrongfully detained by the defendant. The only defence set up was that the complainant was an insolvent and therefore could not sue as the order of sequestration had vested the articles in his official assignee who had claimed them. The Bench overruled this defence and thereupon this order to review was obtained. From the affidavits filed in reply it appears that the articles claimed were chiefly composed of samples of merchandize forwarded to the complainant as an agent to enable him to obtain orders for his principals, the balance of the things being a few trifles of personal wearing apparel. The wearing apparel admittedly would not pass to the official assignee nor would the samples unless in the order or disposition of the insolvent within sec. 70 sub-sec. 5 of the *Insolvency Statute* 1890. But the doctrine of reputed ownership only applies where goods are held in such a situation as to convey to persons exercising reasonable judgment the belief that they are the property of insolvent when in possession of them. This is always a question of fact and the justices in this case having before them the evidence that these articles were "travellers samples" have decided that they were not in the order disposition or reputed ownership of the insolvent so as to pass to his official assignee and the defendant accordingly justified the detention of them under the authority of a third person who had no claims whatever. The decision of the magistrates cannot be disturbed and this rule will be discharged with costs.

Solicitors: In support, *Woolf and Destree*; to oppose, *Sabelberg*.

PROBATE JURISDICTION.

(Before Molesworth J.)

IN THE WILL OF MARTIN BUTCHER.

Dec. 10th.

Will and Codicil—Ambiguity—Admission of parol evidence.

A Testator by his will appointed his wife and a Mr. Lamble executors of his will. Subsequently the testator made what was entirely a new will, but which purported to be only a codicil to the will, appointing his wife and one of his sons as executors. On application for probate to the widow and son held that the codicil did not revoke the will and that parol evidence to shew that it was the testator's intention to revoke the will was inadmissible and

though there were no trusts under the will which Mr. Lamble would be able to perform probate was granted to the widow and the son leave being reserved to Mr. Lamble to come in and prove.

Motion for the grant of probate to the executrix and executor named in the codicil to the will to the exclusion of the executor named in the will on the ground that what purported to be a codicil was really a new will which *ex necessitate* revoked the original will of the testator. In November 1875, the testator made a will appointing his wife and Mr. Lamble executrix and executor thereof. In October 1891, the testator made what purported to be a codicil to the will but which was virtually a new will as it dealt with the whole of the testator's property in a materially different way and the testator appointed his wife and one of his sons executor and executrix of this codicil.

Mr. Moule in support of the application submitted that the so called codicil though it did not expressly revoke the former will, yet as it made a different disposal of the whole of the testator's property it did in fact amount to a revocation.

Mr. Justice MOLESWORTH refused the application as sought on the ground that there was no revocation of the appointment of Mr. Lamble and His Honor gave leave to renew the application upon materials showing that it was the intention of the testator to revoke the appointment of Mr. Lamble.

(Before a'Beckett J.)

Dec. 19.

On a subsequent day the application was renewed on affidavits shewing that the testator intended to appoint his son as executor in place of Mr. Lamble. In the alternative it was asked that probate be granted to the widow and the son without any further advertisement leave being reserved for Mr. Lamble to come in and prove.

Mr. Moule, in support of the application, argued that the codicil amounted to a redistribution of the whole of the testator's property making the trusts placed in Mr. Lamble nugatory and that there was an ambiguity in the documents to explain which parol evidence was admissible. *Jenner v. Finch*, 5 P.D. 106; *Methven v. Methven*, 2 Phil. 416.

Cur ad vult
Feb'y 10th,

MR. JUSTICE A'BECKETT.—In this case the testator made a will in November 1875 appointing his wife and a Mr. Lamble executors. In October 1891 he made what was virtually a new will dealing with the whole of his property and different in many respects from the way in which his will had dealt with it. Instead of expressly revoking the will the document purported to be a codicil to the will and the testator's wife and one of his sons were appointed executors of the codicil. The executors appointed by the codicil now apply for probate of both will and codicil taking no notice of the appointment of Mr. Lamble. In support of this course counsel has referred to authorities under which parol

evidence has been received to remove an ambiguity arising as to the intention to revoke a will and has read affidavits which show that it was the testator's intention to supersede Mr. Lamble as an executor by the new appointment which he made by the codicil. I think such evidence is here inadmissible. The documents are distinct in their terms as to the appointment of executors and the difficulty is caused by the unmeaning reference to the old will which compels the applicant to treat it as unrevoked. Of that old will Mr. Lamble was appointed an executor and I cannot on parol evidence of which the testator wished to do import into a codicil a revocation of this appointment. Practically I think it will be found that the old will is as inoperative as if it had been expressly revoked and if Mr. Lamble were to act as executor confusion would result and there would be no trusts under the will which he would be able to perform. For these reasons I do not think it necessary for the parties now applying to communicate with Mr. Lamble and renew their application in another form after notice to him. As matter of right I hold Mr. Lamble entitled to prove the will as an executor but as he would cause considerable inconvenience to himself and others by doing so I do not anticipate that he will exercise the right. I grant probate to the executors applying reserving leave to Mr. Lamble to come in and prove hereafter. Probate not to issue until the applicant's proctor files an affidavit of notice to Mr. Lamble of the order made with a copy of this judgment.

Proctors, *Davies Price and Wighton*.

(Before Hood J.)

IN THE WILL OF BARKER.

February 18.

Will revocation by tearing Wills Act 1890 s. 18. A very slight tearing across a substantial and important part of a will where there is evidence of an intention to revoke will amount to a revocation of a will.

If a will is revoked, the Court, though all persons interested in the event of an intestacy consent, will not grant probate thereof.

Motion on behalf of the executors for grant of probate to them. The will of which probate was sought was found amongst the private papers of the deceased and when found had a tear across the signature of the testator and portion of one of the letters of the testator's name was missing and underneath the signature in the testator's handwriting were the words "Cancelled J. B., I have not strength to say why." which were written in pencil.

Mr. J. D. Wood in support of the motion. The will though torn across the signature leaves the signature quite legible. This is not a tearing within the meaning of Section 18 of the *Wills Act 1890*. If the testator had torn

off the signature, that would have amounted to a revocation but the tearing here is the same as if a pen had been struck through certain words leaving them quite legible. No tearing which is not a destruction of the will amounts to a revocation. There must be destruction as well as intention to destroy, *Cheese v. Lovejoy* 2 P. D. 251. For all that appears here there may have been some *animus revocandi* but there was no actual destruction. The three next of kin, the three sons desire that probate should go.

Hood J.—I do not think I ought to grant probate of the will unless I am satisfied that it is a proper will. I do not know any authority upon the point but either it is a will or it is not, and there may be other persons to be considered such as creditors, unless I am satisfied that it is a good will I do not think probate should go. The case of *Mole v Thomas* 2 W.B. 1043 shows that a very slight act of tearing is sufficient to revoke a will.

That case was decided before the *Wills Act* came into force.

Hood J.—I have very great doubt on this point. I will consider it,

Cur ad vult.
Feb'y 25th.

Mr. Justice HOOD—This was an application for probate of the will of John Barker, deceased. The will, which is dated 24th March, 1882, was found in a drawer in which Mr. Barker used to keep his private papers, and when found was in the same condition as it is now. It had been duly signed, but the signature has been torn through, and a piece of the paper bearing a portion of one of the letters of the testator's name is missing. In pencil, underneath the signature is written in Mr. Barker's writing the words "Cancelled J.B." and "I have not strength to say why." The will is otherwise legible and complete, and the question has arisen as to whether or not this tearing amounted to a revocation. I am satisfied that Mr. Barker intended to revoke this will. The circumstances seem to me to point to no other conclusion. But mere intention to revoke is nothing unless that intention is given effect to in one of the modes prescribed by the act of Parliament, and so it was contended in support of this application that, whatever Mr. Barker's intentions may have been, he had not complied with the requirements of sec. 18 of the *Wills Act 1890*, as the tearing is so slight and the will is not substantially injured. By that section the Legislature has declared that a will may be revoked by "tearing." But it is not stated how the tearing is to be performed, nor the extent necessary; nor is it enacted that the will must be torn into any particular number of pieces, or in any peculiar way. It has been decided that though the paper has not been completely divided across by the tear, yet revocation would ensue if the intention to revoke had been present *Elms v. Elms*, 1 S. and T. 155 and under the old law a very small tear was held to effect a revocation *Bibb, d. Mole v. Thomas*, 2 W. Bl. 1,043. It seems to me, therefore, that a tearing across an important and substantial part like the signature, coupled with an intention to revoke must be sufficient and I accord

ingly refuse probate of the will. It was stated that all the persons interested in the event of an intestacy would consent to this application, but I ought not to consider their wishes. Other interests are involved, according as this property may be disposed of by will or not, and in addition the Act of Parliament has either been complied with or not and in neither event is the consent of any person material.

(Before a'Beckett, J.)

IN THE WILL OF TOWT.

March 1st.

In this case a caveat was lodged against the grant of probate to the Trustees Executors and Agency Co., the duly appointed agents of the executors under the will. Upon the return of the rule nisi the case was set down for hearing before a judge without a jury. Upon the case being called on for trial application was made for the case to be heard before a jury.

Held that such time was not the proper time for making the application and the trial of the action was directed to proceed.

In this case the testator made a will appointing certain executors. These executors appointed the Trustees Executors and Agency Co. to take out administration with the will annexed. Against the grant a caveat was lodged and a rule nisi calling on the caveatrix to show cause why probate should not go was taken out. Upon the return of the rule the case was set down for hearing before a judge without a jury. At the trial and before the case was opened the caveatrix applied to have the action heard before a jury.

Mr. Purves, Q.C. and Mr. Hayes appeared for the caveatrix in support of the motion.

Mr. Topp and Mr. Weigall in support of the will appeared to oppose.

Mr. Purves, Q.C. In this case I desire to apply that the matter may be set down for trial before a jury. [A'BECKETT, J. Why was not this application made before.] This is the proper time to make the application.

Mr. Hayes. In this case no question of fact in issue between the parties has arisen up to the present time. This is the first time that any question of fact has arisen. [A'BECKETT, J. There is no doubt that the facts may be of a class which a jury might have to consider but what I have to determine is what is the proper time for making this application. The case has been set down for hearing before a judge and it seems to me that this application should have been made then.] Following the practice laid down by *Moss v. Somner* the proper time to make this application is now and there was a case of *In the will of Dixon* decided by Mr. Justice Hood a few days ago in which an application was made for a jury and His Honour expressly held that the return of the rule nisi

was not the proper time for making the application. *In the will of Lamont* 7 V.L.R. (1 P. & M. 86), and several other cases show that the proper time to make this application is when the matter comes on for trial.

Mr. Topp in reply.—The plaintiffs are too late or too soon. Both parties wanted the case set down before a judge and it was set down. Section 23 of the *Administration and Probate Act* has always been interpreted to mean that the matter might be referred to a jury if during the trial the Court feels itself unable to make up its mind on any complicated state of facts, and what I contend at present is that no question of fact arises or can arise until the evidence is gone into. In *Moss v. Somner* the circumstances were very special. One side wanted a jury and the other side wanted certain particulars, and a compromise was arrived at by which the particulars asked for were given and a jury was agreed to. In *Dixon's* case referred to, Mr. Justice Hood said that if he granted the application he would be practically putting the interpretation upon Section 23 that, in every case where testamentary incapacity arises, that that would be a ground for having a jury.

Mr. Weigall.—When this case was mentioned on the 4th of February before Mr. Justice Hood, the only question was whether His Honor would hear it then or set it down for hearing in this month's list. The plaintiff's counsel was there and never suggested that he desired the case to be heard before a jury.

MR. JUSTICE A'BECKETT.—This is an application to have this matter set down for trial before a jury. It is suggested that this is the proper time to make the application, and the order made *In the will of Somner* was referred to as being an authority for the course I am here asked to pursue. On reference to that order it appears to be a very special order made under the peculiar circumstances of the case, as there were a number of special arrangements between the parties. I cannot regard that case as determining the practice. I have here this order in very strict terms directing the case be set down before a judge without a jury. I therefore think as a matter of practice that this is not the right time to make this application, and in the face of this order I think I should proceed to hear and determine this matter. If the parties had consented or desired to have this matter tried before a jury, I might have made the order asked for, but under the circumstances I think I must now go on with the hearing.

Mr. Purves, Q.C.—Under the circumstances, we have been taken by surprise and we will withdraw the caveat, and we must take other steps by means of an action.

Mr. Topp.—In that case I would ask the court to make the order absolute with costs and to grant probate of the will subject to an affidavit of search for any further caveat.

MR. JUSTICE A'BECKETT.—Order absolute with costs. Order probate to issue subject to affidavit that no further caveat lodged.

Solicitors for the caveatrix *Hall*.
Solicitors for the executors *Farmer and Roberts*.

IN CHAMBERS.

(Before Hood, J.)

SWEETNAM V. JACOBS AND OTHERS.

Feb. 23rd.

*Practice, pleading—Rules of the Supreme Court 1884—Order 19 r. 15.**A general demurrer is bad pleading—The point of law relied on must be specifically stated.*

Application to strike out pleading.

This was an application on behalf of certain of the defendants to strike out two paragraphs of the plaintiff's reply to a defence and counterclaim on the ground that they were embarrassing. The action was brought to recover a deposit alleged to have been paid on the sale of certain land by the defendants to the plaintiff; the defendants by their defence set up various facts and also counter-claimed. One of the paragraphs objected to occurred in the reply to the defence and the other in the reply to the counter-claim. In the reply to the defence the plaintiff after a joinder of issue, stated that the allegations of the defence, assuming them to be true, which they denied, disclosed no good ground of defence; in the reply to the counter-claim the plaintiff stated that the allegations of such counter-claim, assuming them etc., disclosed no cause of action.

Mr. MacHugh in support.—The paragraphs objected to amount to a general demurrer, and are not good pleading now. *Gibbs v. Houden*, 16 V.L.R., 269.

[*Hood J.*—I see from the judgment in that case that the learned judge who heard the application stated that a general demurrer was not good pleading now. I do not think it could be good pleading either before or after the *Judicature Act*.]

Mr. Weigall contended that the pleading was good; at most the objection was a mere technicality.

Mr. MacHugh was heard in reply.

HIS HONOR ordered that the paragraphs should be struck out unless the plaintiff amended within one week; costs £3 3s.; certify for counsel.

Solicitors for the defendant *Tuthill Geoghegan and Perry*; for the plaintiff *Ellison and Simpson*.

Before Hood J.

RE OPITZ.

25th & 29th Febr.

Insolvency Act 1890 (No. 1102) sec. 37 (VIII)
Lunatic—Quere where the proviso in subsec. VIII. of sec. 37 can apply to a lunatic.

Petition on behalf of the London Chartered Bank for the sequestration of the estate of Franz Opitz, a lunatic.

Mr. Higgins in support cited *In re Bayldon*, 2, V.L.R. (L.) 85.

HIS HONOR said:—I will consider the matter.

HIS HONOR on a subsequent day read the following

judgment.—In this case the London Chartered Bank presented a petition for the sequestration of the estate of Franz Opitz, a lunatic confined in the Yarra Bend Asylum. In support of the petition I was referred to *re Bayldon* (2, V.L.R., L. 85). That decision is very briefly reported, and though the objection was taken that a lunatic cannot be made insolvent, no reference to the point is made in the judgment, but the order was made absolute, the learned judge apparently acquiescing in the statement of counsel that there was nothing to show that the alleged lunatic was not quite sane in matters of business. I understand, however, that the documents show that the petition there was founded upon subsection 5 of section 37 of the Insolvency Statute. The act of insolvency created by that subsection does not necessarily depend upon any act of the debtor, or upon his volition or state of mind. But in this case the petition is based upon subsection 8, and I think that the proviso to the latter subsection makes a most material difference. The proviso requires that the debtor shall be called upon to satisfy the judgment, and shall fail to do so. It does not seem to me that this can apply to a lunatic, as so much depends upon his own acts (see *re Willison*, 4, V.L.R., L. 67, *re Hodgson*, 5, A.J.R., 133, *Yate Lee* 76, *Pope on Lunacy* 368, and case there cited), unless during lucid intervals, if any. An affidavit has been filed here to show that the debtor understood the nature of the demand made upon him, but I am not satisfied that he did. There is no evidence as to his state of mind by any skilled person, or by anyone having an opportunity of forming a proper opinion. I therefore refuse this application upon the present materials, without prejudice to a further application, though it must not be assumed that I would have made the order even if satisfied upon this point, for much might turn upon the debtor's answer to the demand. In addition, the papers do not set out any authority in the person presenting the petition.

Solicitors for petitioner, *Attenborough, Nunn and Smith*.

(Before Holroyd J.)

QUINN V. MACARTNEY.

1st., 2nd., 7th. March.

Supreme Court Act 1890 (No. 1142) sec. 85—Foreign procedure—Wilful neglect to appear.

A judge has to be satisfied not merely that the defendant neglects to appear, but also that his neglect is wilful. Proof of service of the writ upon the defendant and of his non-appearance coupled with a statement on oath by a deponent of his belief that the defendant wilfully neglects to appear without any other facts being disclosed from which an inference can be drawn one way or the other is not sufficient to satisfy the judge that the defendant has wilfully neglected to appear to the writ.

Application on behalf of the plaintiff under sec. 85

of the *Supreme Court Act 1890* for liberty to proceed and that the amount for which final judgment was to be signed should be ascertained by the Prothonotary.

A question arose as to the sufficiency of the affidavits filed in support of the application and His Honor reserved his judgment.

His Honor on a subsequent day read the following judgment:—Some days ago an application was made to me under section 85 of the *Supreme Court Act 1890* for liberty to proceed in this action, and that the amount for which final judgment was to be signed, should be ascertained by the prothonotary. That section requires that before granting such liberty the Court or judge is to be satisfied by affidavit that, amongst other things, the writ was personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof upon him, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the Court in order to defeat and delay his creditors. The plaintiff made the usual affidavit setting forth the cause of action, showing that it arose wholly within the jurisdiction of the Court, and alleging that the defendant had no defence. It further appeared by the affidavit of Peter Macpherson, clerk to a solicitor of Sydney, that on the 4th of February last the defendant, who is described in the writ of summons as a bank manager, had been personally served at No. 72 King-street, Sydney, with a true copy of the writ. The writ itself showed that the time for entering an appearance had recently expired, and I was informed by Mr. Proctor, a clerk of the plaintiff's solicitor, that no appearance had been entered for the defendant. I was asked to accept Mr. Proctor's statement to that effect without an affidavit, and also from the bare facts of service and non-appearance to draw the conclusion that the defendant wilfully neglected to appear to the writ. This I declined to do. The application was renewed on the following day, March 2, Mr. Proctor having in the meantime supplemented his previous proofs by an affidavit of his own, in which he set forth that the time for appearance expired on the 24th of February, that he had searched in the proper office on the day of the renewed application and found that no appearance had been entered by the defendant or his solicitor, and then added these words—"The defendant wilfully neglects to appear to the said writ." Mr. Proctor, as I understood him to say, had no knowledge of any other facts to warrant this positive assertion than those before mentioned; and in my opinion the swearing thus roundly to facts of the truth of which the deponent cannot possibly be assured is, to say the least, a very lax and improper practice. Mr. Proctor might, however, have conscientiously sworn that he believed the defendant wilfully neglected to appear, if in reality he so inferred from the defendant having been served and not having appeared within the prescribed time; and the question arises whether proof of service of the writ upon the defendant and of his non-appearance within the prescribed time, coupled with a statement upon oath

made by the plaintiff or his solicitor, or, as in this case, by the solicitor's clerk, of his belief that the defendant wilfully neglects to appear to the writ, without any other facts being disclosed by the affidavits from which an inference can be drawn one way or the other, ought to satisfy the Court or judge that the defendant is guilty of this wilful neglect. It has never been my practice to regard such evidence as sufficient, but, as I have been informed that orders for leave to proceed have sometimes been granted upon precisely the same evidence, I have been led to reconsider my opinion, and, having reconsidered it, I am the more confirmed in it. For of what is the judge to be satisfied? Not merely that the defendant neglects to appear, but also that his neglect is wilful. If wilful neglect to appear was meant to be inferred from the defendant's not having appeared within the time limited after having been duly served, the Legislature would have simply required proof of such non-appearance. Non-appearance might without inaccuracy be described as neglect to appear; but wilfully neglecting to do a thing implies more than merely leaving it undone. It may undoubtedly be often very difficult to prove wilful neglect, and the judge will usually, I should think, be able to collect from very slight circumstances added to the fact of non-appearance, the intention not to appear. But according to the plain language of the act, the added circumstances, from which the judge may conclude that the omission to appear was wilful, must be brought before him by affidavit, and the judge must form his conclusions for himself, and not accept anybody else's belief as a substitute for his own judgment. The 85th section of the *Supreme Court Act 1890* is an adaptation of the 18th section of the *English Common Law Procedure Act 1852*, and Day (*Common Law Procedure Acts* 4th ed., p. 57) says in a note to that section that the defendant's wilful neglect to appear will be presumed after the writ has come to his knowledge. Day cites no authority for that proposition, and he is in direct conflict with Chitty, who in his *Forms* (10th ed.) has sketched out affidavits to fulfil the requirements of the 18th section of the *Common Law Procedure Act 1852*, and in a note to one of the paragraphs (see p. 69, also 67) thus expresses himself—

"The plaintiff or the person who had the serving of the writ, or some other person, should swear to the residence of the defendant abroad, and to the distance of it from England to facts showing that the defendant either wilfully neglects to appear or that he is living out of the jurisdiction in order to defeat and delay his creditors. The facts must be so stated as to satisfy the judge that such is the case. After stating the facts the affidavit may conclude thus—'For the reasons aforesaid I verily believe that the defendant wilfully neglects to appear to the said writ;' or, 'That the defendant is living out of the jurisdiction in order to defeat and delay his creditors. There should be an affidavit stating that there has been a search in the proper office for the defendant's appearance, and that there is none.'"

When a deponent swears to facts from which a judge is asked to draw a certain conclusion, the averment of the deponent's belief may be useful to show that he has made a full disclosure, and knows nothing contrary to the conclusion suggested. For any other pur

pose I think it is worthless; but with that qualification, if indeed it be a qualification, I assent to the rule which Mr. Chitty has laid down. Upon the materials now before me I refuse the application.

Solicitor for plaintiff, *Boyd*.

(Before Holroyd, J.)

ANDERSON V. DOUGLAS AND COY.

1st, 4th March.

Rules of Supreme Court 1884 Order XXXI. r. 11.—

Interrogatories—Further answers—Libel.—In an action for libel a defendant may object to answer an interrogatory as to whether he published the alleged libel on the ground that the answer might tend to criminate him when an objection is taken to answer an interrogatory on the ground that it may tend to criminate the person interrogated, the judge must decide whether in his opinion the question may have such a tendency.

Application on behalf of the plaintiff for an order that the defendants do deliver further and better answers to certain interrogatories.

The pleadings were as follows:—

Statement of Claim.

1. The plaintiff was at all times necessary for this action a resident of and an alderman of the town of Geelong and as such alderman was and was known generally to be a candidate at a then shortly ensuing election for the office of mayor of the said town and but one other alderman beside the plaintiff was a candidate for the said office at the said election therefor.

2. The defendants at all times necessary for the purposes of this action were the proprietors and publishers of a certain newspaper circulating at Geelong aforesaid called and known as the *Geelong Advertiser*.

3. The defendants falsely and maliciously printed and published in the said newspaper of and concerning the plaintiff and of and concerning him as such alderman and of and concerning him as such candidate as aforesaid the following scandalous words: "Time was when a Manners Suttons or a Normanby satisfied the ambition of the elite of colonial society. That is no longer the case and in municipal matters we ought not to be satisfied with a class of men as majors who are utterly unable to realise the duties which attach to so honorable and responsible a position (meaning to indicate as a person of that class the plaintiff.) A man for example who is sober only by accident (thereby meaning the plaintiff), and who is so amorously inclined that he cannot enter a manufactory where women are employed without embracing the most buxom of them is scarcely the creature (meaning thereby the plaintiff) that we should select to preside over our municipal affairs. . . . We therefore utter in time a word of warning not to the burgesses who unfortunately have no voice in the selection but to the Town Council (meaning the Town Council of the said Town of Geelong which possessed the right of electing the Mayor of the said town) who will be held seriously responsible for what they do at the forthcoming mayoral election."

4. The defendants meant and intended to and did convey by the said words that the plaintiff was an individual so destitute of intelligence and personal dignity and of the ordinary sense of duty and responsibility to or in a public office of mayor of Geelong that he was wholly unfit to be appointed to or entrusted with the office of mayor of Geelong and if he were entrusted therewith he would degrade and discredit it. And the said defendants also meant and intended to and did convey by the said words that the plaintiff was a person of so habitually drunken habits that it was only by some accident which restrained the plaintiff from access to intoxicating liquors that he was ever sober, and further that

the plaintiff was a person who had so little reasonable and proper control over his amorous propensities that on entering a place of business where women were employed, the plaintiff was destitute of all sense of dignity and propriety either in himself or towards the said women was accustomed to seize on and embrace such of them as he chanced to fancy. And further that by reason of the said misconduct the plaintiff could not accurately or appropriately be described as a man but was a creature practically of a lower order than mankind, and an individual wholly unworthy of and impossible to be elected to the office of mayor of Geelong.

5. By reason of the premises the plaintiff was greatly injured in credit and reputation, and was also injured in his credit and reputation as such alderman of the said Town Council of Geelong and by reason of the nearness of the said election to the said publication was disabled from disabusing the minds of the councillors and aldermen of the said Town Council of the Town of Geelong of the said charges before the said election and was therefore compelled to and did in fact withdraw his candidature for the said office.

6. The defendants also falsely and maliciously wrote and published of and concerning him as such alderman as aforesaid the following scandalous words: "If we tell the burgesses that their money has sometimes been voted away by a man (meaning the plaintiff) so drunk that he (meaning the plaintiff) could not possibly have known what he (meaning the plaintiff) was doing it may possibly induce them to ponder over the statements of the Chairman of the Finance Committee of the Council and seek for an explanation of them."

7. The defendants meant and intended to and did in fact convey by the said words that the plaintiff, in total disregard of his duty as and being, as the fact was, the Chairman of the Public Works Committee of the Council of the said Town of Geelong, or as and being an alderman of the said Council, used to come at times to the discharge of his duties as such Chairman or as such alderman in such a condition of drunkenness as to be quite incapable of duly performing the said duties of his said office or offices, and that notwithstanding and reckless of that fact the plaintiff on such occasions as such Chairman or as such alderman voted away the public funds of the said Town of Geelong to the great detriment and disadvantage of the said Town, and that in view of the said matters the conduct and statements of the plaintiff as such Chairman or as such alderman deserved and demanded a close and, to him, discreditable investigation.

8. By reason of the premises the plaintiff was greatly damaged in his credit and reputation as such alderman and Chairman of the Public Works Committee of the said Council aforesaid.

9. The defendants also on the 13th day of March 1891 falsely and maliciously printed and published of the plaintiff and of him as such alderman of the said Town of Geelong, the following scandalous words:—"Members of the Council (meaning the Town Council of the Town of Geelong) affect a happy unconsciousness of having any black sheep in the fold and they innocently ask us to enlighten them further on the subject. . . . We will give them all that they ask for with possibly something added, but in doing so we shall expect to be indemnified against any action that may be taken upon it. If the Council (meaning the said Council) is then in a position to prove that we made a false allegation we will make the fullest possible amends. We think however that when they (meaning the said Council) have taken counsel with each other they will conclude that to give the indemnity we ask for would be a risky proceeding, and that they (meaning the said Council) had better seek out their black sheep, whitewash him, and, for the credit of the Council (meaning the said Council) generally put him upon his good behaviour."

10. The defendants intended by the said words to convey that the plaintiff was the black sheep of the said Council, and that by his misconduct and evil habits he stood in exceptional contrast to the rest of the said Council and was a dis credit and disgrace to it.

11. By reason of the premises the plaintiff was greatly injured in his credit and reputation, and in his credit and reputation as such alderman of the said Council and was otherwise

injured.

To this the defendants pleaded that they did not admit the allegations in paragraphs 1, 3, 4, 5, 6, 7, 8, 9, and 10 of the Statement of Claim, and that is they printed the words complained of in paragraphs 3, 6, and 9, that such words without the meanings were true in substance.

The interrogatories, the answers to which were under review, were as follows:—

2. Was not an election for the office of Mayor of the Town of Geelong appointed to be holden on the 9th October 1890, or how otherwise?

3. Was not the plaintiff as such alderman as aforesaid or how otherwise known to or believed by the defendants or by their editor, Reuben Quarrell, and by the burgesses of Geelong to be a candidate at such election for such office of Mayor?

4. Look upon the three several prints exhibited to you herewith and marked respectively A. B. and C. and answer were not each and every of such prints printed and published by you the defendants or for and on behalf of you the defendants as the proprietors and publishers of the newspaper called and known as the *Geelong Advertiser*, and are not the said prints part of the issues of the said newspaper printed and published by or for the defendants on the 7th October 1890, the 5th March 1891, and the 13th March 1891 respectively? If nay, how otherwise?

5. Were not the words [here followed the first alleged libel as set out in paragraph 3 of the Statement of Claim] which appeared in the print of the *Geelong Advertiser* of the 7th October 1890, and exhibited to the defendants herewith and marked A. or some of such words and if so which intended by you or your agents or contributors to refer to the plaintiff, and to the plaintiff as an alderman of the Town of Geelong and to the plaintiff as such candidate at the election for the office of Mayor of the Town of Geelong.

6. If the words quoted in interrogatory 5 or some of them were not intended to apply to the plaintiff as in the said interrogatory 5 inquired of them to whom were such words intended to refer?

7. If the said words set out in interrogatory 5 and printed and published in the said *Geelong Advertiser* of the 7th October, 1890, and exhibited to the defendants herewith and marked A or some of them were intended to refer to the plaintiff, then set forth the occasions and the places or the principal of them on which it is by the said words alleged the plaintiff was drunk so as to warrant the conclusion that he was sober only by accident. Also set forth the name and locality of the manufactory in the said words referred to so as to identify it.

8. Do not the words set forth in the said 5th interrogatory mean and were they not intended to mean substantially what is alleged in paragraph 4 of the statement of claim? If nay, what do the said words mean, or what were they intended to mean?

9. Did not the plaintiff in fact withdraw his candidature for the office of Mayor of Geelong at the election to have been holden for such office on the 9th October 1890 after the publication of the *Geelong Advertiser* on the 7th October 1890, and before the holding of the said election and are not the defendants or is not their editor Reuben Quarrell aware that the plaintiff so withdrew his said candidature by reason of the probable injurious effect on such candidature by reason of the publication of the words complained of in paragraph 3 of the statement of claim in the said *Geelong Advertiser* of the 7th October 1890? If nay, state how otherwise he withdrew such candidature.

10. Have the defendants or their editor the said Reuben Quarrell or their agents ever seen or known the plaintiff to be or to have been drunk? If yea, when and where and on what occasion or occasions?

11. Have the defendants or their editor the said Reuben Quarrell or their agents ever seen or known the plaintiff embrace or to have embraced any female employed at any manufactory? If yea, who was such female, and at what manufactory was she employed, and where did such embracing take

place?

12. Were not the words "If we tell the burgesses that their money has sometimes been voted away by a man so drunk that he could not possibly have known what he was doing," set forth in the *Geelong Advertiser* of the 5th March 1891 exhibited herewith and marked B intended to refer to the plaintiff? If nay, to whom were the said words intended to refer?

13. If the said words referred to in interrogatory 12 were intended to refer to the plaintiff, then state the occasions where and when the plaintiff was drunk as in the said words alleged.

14. Were not the said words set out in interrogatory 12 intended to bear and do they not bear the meaning assigned to them by paragraph 7 of the statement of claim herein? If nay, how otherwise.

15. Look at the words set forth in quotation in paragraph 9 of the statement of claim herein and also appearing in the *Geelong Advertiser* of the 13th March 1891 exhibited to you herewith and marked C were not the said words intended to indicate and refer to the plaintiff as the "black sheep" therein referred to? If nay, what other person was intended to be indicated or referred to thereby?

16. Do not the said words referred to in interrogatory 15 mean and were they not intended to mean substantially what they are alleged to mean by paragraph 10 of the statement of claim? If nay, then what other meaning do they bear or were they intended to bear?

17. Were not the words complained of and set forth in paragraphs 3, 6, and 9 of the statement of claim respectively and appearing in the *Geelong Advertiser* of the 7th October 1890, the 5th March 1891, and the 13th March 1891 respectively exhibited herewith and marked respectively A, B, and C, written by the said Reuben Quarrell as and being the editor of the said newspaper the *Geelong Advertiser*? If nay, then by whom were the said words written?

The answers to the above interrogatories were as follows—

2. As to the second interrogatory we believe that the 9th day of October is the day appointed for the election of the Mayor of the Town of Geelong.

3. As to the 3rd interrogatory we say that we are unable to say of our own knowledge, information and belief whether the plaintiff was a candidate for the office of mayor, and we decline to answer further the said interrogatory.

4. As to the 4th, 5th, 7th, 12th, 13th and 15th interrogatories we decline to answer the same, on the ground that the answers thereto might tend to criminate us.

5. As to the 6th, 8th, 14th and 16th interrogatories we decline to answer the same on the grounds that they are irrelevant, and that our answers thereto might tend to criminate us.

6. As to the 9th interrogatory we are unable to answer the same as to our knowledge, information and belief, as we were not aware that the plaintiff was a candidate for the position of mayor, and we decline further to answer the said interrogatory, on the ground that it is fishing and irrelevant.

7. As to the 10th interrogatory, we say that Frederick Montague Douglass saw and knew the plaintiff to be drunk on the 11th December, 1889, and we have seen and known the plaintiff to have been drunk on divers occasions in Geelong and elsewhere, during the years 1889, 1890, and 1891, and we are unable more closely to fix the said occasions; and we decline further to answer the said interrogatory on the ground that it is fishing and irrelevant.

8. As to the 11th interrogatory none of the defendants have ever seen or known the plaintiff to embrace, or embraced any female employed in any manufactory.

9. As to the 17th interrogatory we decline to answer the same on the ground that it is irrelevant.

Dr. Madden in support.—In an action for slander the plaintiff may administer interrogatories asking the defendant whether he uttered the words complained of, and whether they or the substance of them had been communicated by a third person. *Daily Tele-*

graph Newspaper Company (Limited) v. Berry, 5 V.L.R. (L) 343, and therefore he may be asked whether the words refer to the plaintiff. A defendant may claim that an admission might tend to criminate him *Smith v. Powell*, 10 V.L.R. (L) 79, but the Court has to be satisfied that the answer might have that result, *Roper v. Williams*, 6 A.L.T. 65. Quarrel is the agent or servant of the defendants, and therefore, they would be liable if he wrote the words complained of, and as their servant or agent they are bound to obtain from him the information sought, *McMeckan v. Aitken*, 13 A.L.T. 33, Annual Practice | 92, D. pg. 564.

Mr. Coldham to oppose.—Every person who publishes a libel is liable to be prosecuted criminally, and there he can claim privilege. When an objection is taken on oath that the answer might tend to criminate the person interrogated and there is no evidence to the contrary the judge is bound to assume the objection is *bona fide*. Reference was made to Odgers on Libel 2nd ed. p. 517.

HIS HONOR said, I will consider the matter.

HIS HONOR on a subsequent day said,—I shall order that the defendants do deliver to the plaintiff within 4 days further and better answers to the 2nd and 3rd interrogatories, excepting so much of the 3rd interrogatory as relates to the burgesses of Geelong. I think the answer to the 4th interrogatory might tend to criminate the defendants. The 5th interrogatory is so framed as to imply an admission of publication, and the answer might also tend to criminate the defendants. The same objection applies to the answers to the 7th, 8th, 12th, 13th, 14th, 15th and 16th interrogatories. The 6th interrogatory is irrelevant and an answer might tend to criminate the defendants. The 9th, 10th and 11th interrogatories have, in my opinion, been sufficiently answered, and the information sought by the 10th interrogatory as to the time, place and occasions may be obtained in another way. I do not think that an interrogatory can fairly be put as to how far the editors of a paper or their agents are to be asked to support a charge of drunkenness, and the same observation applies as to the 11th interrogatory with respect to the charge of embracing females. The plaintiff is not entitled to demand, as he has done by the 17th interrogatory, by whom the articles were written. I may add that I adhere to what I said in the case of *Roper v. Williams*, namely, that the Judge must, when an objection is taken to answer an interrogatory on the ground that it may tend to criminate the person interrogated, decide whether in his opinion the question may have such a tendency. That is in accordance with the case of *Lamb v. Munster*, 10 Q.B.D., and there is nothing inconsistent with it in the opinion expressed by the Chief Justice in the case of *Smith v. Powell*, 10 V.L.R. The defendants to have 4 days to answer further as directed. Costs in the cause. I certify for counsel.

Solicitors, for plaintiff, *Davies, Campbell and Davies*; for defendant, *Davies, Price and Wighton*.

Before Holroyd J.

RICHELIEU V. BROOKES.

14th March.

Rules of Supreme Court 1884 Order XIV. r. 1—Final judgment—Affidavit in reply—In applications for final judgment under Order XIV. r. 1 a judge ought not to look at an affidavit in reply to the defendant's answering affidavit.

Application on behalf of the plaintiff to sign final judgment under order XIV. r. 1.

On behalf of the plaintiff it was sought to read an affidavit in reply to the defendant's answering affidavit.

Mr. Stawell objected to the affidavit in reply being read. It was contended in support that the answering affidavit set up new matter and that therefore the affidavit in reply should be allowed. Reference was made to *Husbands v. Rowley*, 12, A.L.T. 173.

HIS HONOR said:—I do not think I ought to look at an affidavit in reply to the defendant's answering affidavit in applications under order XIV. r. 1, for final judgment.

Solicitors for plaintiff *Wisewould, Gibbs and Wisewould*; for defendant *Malleson, England and Stewart*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Williams, & Holroyd, J.J.)

SANDER V. THE QUEEN.

Feb. 15, 16, 29.

Land Act 1884 sections 27, 29—Pastoral lease—Order of redemption—ultra vires—"Homestead."

An order of the Governor-in-Council requiring for mining purposes all the land comprised in a pastoral lease, incorporating as conditions sub-sections 8, 10, and 13 of section 27 of the Land Act 1884 is valid although the order purports to be made in exercise of the power conferred by sub-section 8. Payment of the requisite sum is a condition precedent to the exercise of the powers conferred by section 29 of the Land Act 1884.

Appeal from judgment of Hood, J. (see 12 A.L.T. 130).

The facts are set out in the report of the case when heard below (see 12 A.L.T. 130.)

Dr. Madden, Mr. Topp and Mr. Hayes for the appellant (petitioner). If the Governor-in-Council intended to resume the whole of the land demised by the lease, he should have proceeded under sec. 68 or under subsection 13 of section 27, both of which provisions form conditions of the lease; it is clear that the decision in *R. v. Cowie* 7 V.L.R. (L) 88 does not apply, as that case was decided upon one independent provision, whereas in the lease in question alternative methods of resumption are provided; if certain conditions in the lease expressly deal with a resumption of the whole of the land demised, it is obvious that a condi-

tion dealing with any part or parts of the land demised must be restricted to a part and does not authorise a resumption of the *whole* of the land; therefore the Governor-in-Council was wrong in proceeding to resume *the whole* under the 8th sub-section and the order is consequently *ultra vires*. Assuming, for the sake of argument that the order is a valid one, nevertheless the petitioner had fulfilled all the conditions precedent to his exercising his right under the 29th section before the order was made; if the words of that section are so construed as to make payment of the money a condition precedent to selection, nevertheless, the Governor-in-Council had waived any such objection by the regulations which had been made and which are to have the force of law.

Mr. J. D. Wood and *Mr. MacHugh* for the respondent. The Governor-in-Council is empowered by the 8th sub-section to resume any of the land demised; if he is entitled to resume a part he is entitled to resume the whole, as it would be absurd that he should be put to the needless inconvenience of resuming the whole by a number of successive orders when the same object could be attained by one order. *Re Cowie* 7 V.L.R., (L) 88; *Doe d. Gardiner v. Kennard* 12 Q.B. 253; *Liddy v. Kennedy*, L.R. 5 E. & J. Ap. 134; the absurdity of contending that the operation of sec. 68 and sub-section 13 of section 27 restricts the power of the Governor-in-Council to the resumption of a part only, is clear, because there is no explanation of what a "part" is; moreover the Governor-in-Council is empowered by the lease to "elect" under which condition he will proceed and even though this power is *ultra vires* the lessor is estopped from so contending *Matt v. Peel*, 2 V.R. (M) 27. As regards the second question, payment of the money is clearly a condition precedent to the right to select, *Weston v. Collins* 34 L.J. Ch. 353; *Lord Ranelagh v. Melton*, 34 L.J. Ch. 227, *Woodfall* (1889) 120; *Davis v. Thomas* 1 R. & M. 506; *Brooks v. Garwood* 2 De G. & J. 62; the regulations do not operate as a waiver, inasmuch as they are not inconsistent with the provisions of sec. 29.

Cur. adv. vult.

HIGINBOTHAM C. J. :—The petitioner was a lessee under a lease of a pastoral allotment, containing 26,600 acres of land, dated 1st July, 1890 and issued under section 21 of the Land Act 1890. The terms of all leases issued under this section must expire not later than 14 years after December 29, 1884, and at the end of the term, the land and all improvements, with certain exceptions, revert absolutely to the Crown. The term of the lease to the plaintiff was for a period of eight years and six months, less three days, and would expire at the extreme limit of all such leases on December 29, 1888. On September 1, 1890, the petitioner lodged an application, under section 29 of the act in the form prescribed by regulations made under section 142 to select 320 acres, portion of the allotment. On the same day, but at a later hour of the day, possession of the whole allotment was resumed for mining purposes by order of the Governor-in-Council, purporting to be made under a condition of the lease in accordance with the condition contained

in section 27, subsection 8 and required by subsection 1 of the same section to be inserted with other covenants (a term which appears to include conditions), in every lease of a pastoral allotment. The petition alleges that the Order in Council is null and void, inasmuch as the same is *ultra vires*, and that the petitioner is entitled, upon payment of £320, to a grant in fee simple of the land which he applied to select: Three questions were argued and determined in the Court below. The same questions have been argued before this Court on appeal from the judgment of the primary judge. The first of these questions is, whether the whole of the allotment can be resumed by one order of the Governor-in-Council under the prescribed condition of the lease contained in subsection 8 of section 27. If this condition stood by itself, and had to be construed apart from the conditions in subsections 10 and 13 of the same section, and from the provisions of section 68 it is hardly disputed that it would authorise the resumption by one order of the whole of the land demised by the lease. The use of the words "any of the land" does not apply any restriction. The right to resume every part, and by a single act of resumption, results from the reservation of the right to resume any part—per *Denman C. J.*, in *Doe dem Gardner v. Kennard*, 12 Q.B. 253; *Regina v. Cowie*, 7 V.L.R. (L) 88; *Liddy v. Kennedy*, L.R. 5 E. and J., app. 134. But we were strongly pressed in the argument to consider subsection 8 in connection with subsections 10 and 13, and with section 68, and to apply a construction to each of these provisions of the act of Parliament consistent with the others, and with the various occasions and circumstances under which land held under a pastoral lease may be resumed for mining purposes. We are of opinion that it is impossible to do this. It has been suggested that these different provisions of the act constitute a graduated scale, according to which, where the quantity of land required for resumption is very small, no compensation for the value of the land resumed or improvements is to be given; where the quantity required is larger, but less than the whole, some compensation is to be given; and where the quantity required comprises the whole of the land leased full compensation for the value of the land and of the improvements is to be given. If this interpretation is to be accepted, the condition contained in subsection 8 only applies to cases where the quantity of land to be resumed is very small, and the Governor-in-Council has no power to resume a large part or the whole of the land. But according to this view of the condition, great violence has to be done to the terms of the condition. The majority of purposes of resumption enumerated in the condition undoubtedly require only a small quantity of land to be taken out of a large area. But some of the enumerated purposes, notably mining purposes and forest or timber reserves purposes might require the resumption of a large part or of the whole of the land included in the lease; and the only answer that has been offered to this obvious difficulty is that the word "purposes" in these cases must be taken to mean purposes incidental to forest and

timber reserves, and mining operations already existing and requiring the resumption of a small piece of land only. Such a construction also requires a different meaning to be placed on the same words "for mining purposes" in subsection, 10, where, according to the argument, a much larger though undefined quantity may be resumed, and in section 68, where according to the same argument, the whole may be resumed for the same purpose. Moreover, it requires an entirely different construction and effect to be given to this subsection 8 of section 27, and to subsection 10 of section 38 of the act. This latter subsection contains a power of reservation and resumption of land in a grazing area in the same terms as the power in subsection 8 of the earlier section, "upon payment to the lessee for his interest in such lease," together with the value of improvements. These words imply that upon payment for the interest in the lease the lease shall be at an end, and the Governor-in-Council may resume possession of the whole of the land included in the lease. We should violate the rules of sound construction of an act of Parliament if we held that the power of resumption created by identical words in these two subsections differs in degree and in effect because compensation is given upon the exercise of the power in the one case, and is not given in the other case. There is a distinction between the power of resumption in subsection 8, and that contained in subsection 10 or section 21. In subsection 8 to justify the resumption the Governor-in-Council is required judiciously to determine that the land is presently required for some one or more of the purposes enumerated, but no such provision is contained in either of the other two subsections of section 27, or in section 68. Such are some only of the difficulties that meet the attempt to limit the power of resumption of the whole of the land contained in a pastoral allotment. We concur in the further weighty observations on this question contained in the judgment of the learned primary judge, and in his conclusion that the respondent, having power under the prescribed condition of the lease contained in section 27, subsection 8, to resume any part or parts of the land demised from time to time, had also power under the same condition to resume the whole at once, and that the Order in Council is accordingly valid. The second question is whether, assuming the Order in Council to be valid, the petitioner has not acquired an enforceable right under section 29 of the Land Act 1890 to select a portion of the allotment as a homestead by virtue of the lodgment of his application, in accordance with the regulations, on September 1, 1890 and before the making of the order. The answer to this argument is, that the Act of Parliament gives the right to select only "on payment" of £1 per acre for each and every acre comprised in the homestead lot. These words constitute, in our opinion, a condition either precedent to or concurrent with the right to select, and unless there be either payment or readiness and willingness to pay no right to select exists. *Campbell v. Bent* 6 V.L.R. (L) 117; *Lord Ranelagh v. Milton*, 2 D and Sm. 278. 34 L.J. Ch. 327; *Painter*

v. James, L.R., 9 C.P. 348. The regulation giving a form of application by the intending selector is perfectly consistent with the act. It merely directs what the selector shall do when he intends to select. The making of an application in accordance with the regulation is not a selection and it confers no right until the statutory condition is complied with. An amendment of the pleading was allowed at the hearing by which the petitioner raised a third question, namely; whether, assuming payment to be a condition of his acquiring any right, the respondent was not estopped from setting up that condition, or had not waived its performance by reason of the form of application prescribed by the regulation which the petitioner strictly followed. To this it is answered that the regulation in question does not purport to estop, and that it has not the effect of estopping the respondent from setting up the statutory condition; that the regulation, if it has such effect would be *ultra vires*; and that the petitioner had not any evidence to show that he was induced, in fact, by the form of application prescribed to refrain from paying or tendering payment of the money, even supposing that payment or tender could have had at that stage any effect. The appeal will be dismissed with costs. The judgment appealed from will be confirmed.

Solicitors for petitioner (appellant), *Warman*; for respondent *Crown Solicitor*.

(Before Higinbotham C. J., Williams & Holroyd, J.J.)

BANK OF SOUTH AUSTRALIA V. CITY AND COUNTY PROPERTY BANK.

Feb. 18, 19.

Stamps Act 1890, s. 77, s. 87, sub. 4.—Companies Act 1890 s. 48.—Execution of P. N. by company.—Bond fide holder.

Plaintiff was the holder of a promissory note made by three directors of the defendant company for and on behalf of the defendant company. The learned judge who tried the case, had found that the stamp had been affixed to the promissory note previously to all the signatures being attached to it. He also found that the stamp itself had been cancelled, subsequently to all the signatures being attached to the promissory note. The cancellation had been effected by the name of the defendant company being written across the stamp, together with the date 1st Sep. 1888.

Held that the promissory note should be deemed to be duly stamped within the meaning of section 87, subsection 4 of the Stamps Act, 1890, as regards the plaintiff, who was a bond fide holder.

Held also, that, assuming the true date of cancellation was not the 1st Sep. 1888, still, inasmuch as the stamp itself had been affixed previously to the execution of the promissory note by the defendant company, the plaintiff was further protected by section 77.

A promissory note made by three directors of a com-

pany by and on behalf of the company is not executed by the company until all the signatures of the three directors are attached to the promissory note.

Appeal from Hood, J.

The facts and arguments appear in the judgments of the Court.

Mr. Hobday appeared for the defendant (appellant).

Mr. Higgins and *Mr. Mitchell* appeared for the plaintiff (respondent).

HIGNBOTHAM, C.J.—In this case we are all of opinion that the appellant has failed. It is an appeal from the judgment of Mr. Justice Hood giving judgment for the plaintiff upon a promissory note dated the 1st of August 1888, payable to the Preston Heights Estate Company for the sum of £19,516 8s. 6d. Various questions were raised at the hearing, but the single question argued before us is raised by the second clause of the defence, viz., that this promissory note was invalid in that it was not duly stamped or at all at the time of its being made. The learned judge was of opinion that all the grounds of the defence failed. We, too, are all of opinion that the defence has failed. I am of opinion that it has failed on both grounds, and owing, I think, to a mistake on the part of the defence, which lies at the foundation of the argument applied to both grounds, that mistake being that this was a promissory note which was executed by more than one person, and that therefore it became the duty of the person who first executed the document at the time he executed it then to cancel the stamp. Now, taking the first ground on which the plaintiffs rely, viz., under section 77 of the *Stamps Act*, they claim to have brought themselves by proof within the second alternative of that section. Now, this section provides—

“That an instrument, the duty on which is required by law to be denoted, either wholly or partly, by an adhesive stamp, shall not be deemed to be duly stamped unless the person required to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of so writing, or, unless it is otherwise proved, that the stamp appearing on the instrument was affixed thereto at the proper time.”

Under this alternative it has been incumbent on the plaintiff to prove that the stamp appearing on this instrument was affixed thereto at the proper time. Now, what is the proper time for affixing the stamp? In the hands of a holder that question is answered by the judgment in *Goldberg v. Devlin*, 12 V.L.R. at p. 799, which says:—

“Therefore under the second alternative, by reading sections 46 and 47 together, it appears that the person who relies on the instrument, if he has taken and holds it when it does not present on its face a proper cancellation, is subject to his obligation of proving to the Court by other evidence that the stamp was affixed thereto at the proper time, and by or by the authority of the proper person.”

Under this point it is assumed that this instrument does not or may not bear a proper cancellation upon the face of it. But what is the proper time for affixing the stamp on this instrument? That question is answered by this same case, which says—

“For there is no doubt that the affixing of the stamp may be before—even some time before—or at the time of signing the note.”

That is the time of its execution. When was this note executed? It is executed when it is completely signed by all the necessary persons, and in a form to make it binding on the defendant company. The mistake which lies at the root of all the arguments appears to me to be this, that these arguments assume that this is a note which has been executed by three persons, and not a note executed by one person. It is a promissory note executed by a corporation under the trading company's laws, and it is executed in conformity with the powers given by the *Companies Act* 1890, section 48, which provides—

“A promissory note shall be deemed to have been made on behalf of any company under the part of this Act if made in the name of the company by any person acting under the authority of the company, or if made by or on behalf of the company by any person acting under the authority of the company.”

This note is signed by three of the directors of the defendant company for and on behalf of the City and County Property Bank, and the proper time for affixing the stamp to the instrument is, in my opinion, some time before or at the time when the signatures of the three directors have been completed. It is not a case in which the note is executed by more than one person; if it were, the time for cancelling the stamp on that note would be at the time when the note is so executed by the person first executing it. It is a note executed by a company (by persons duly authorised by that company), and it becomes an executed note only when it becomes executed by those persons so authorised as to bind the company. What are the facts found by the learned judge, and which appear to be supported by a preponderance of the evidence? This stamp was affixed some time or other before the signatures of the three directors were attached to it. The precise time when all these signatures were completed is not clearly shown, but they were all completed some time before the 1st of September (probably on the 28th or 29th August), and on the 1st of September this obliteration appears to have been placed on this stamp, and on the same day and after the obliteration this document came into the possession of the plaintiffs. These facts the learned judge has found, and we think the evidence supports his finding, that this stamp was affixed at or before the time the note was executed, which is the proper time; and also that it was affixed by or by the authority of the proper person, viz., the corporation, and that proof having been given, the plaintiffs are entitled to rely upon the second alternative of section 77 of the *Stamp Act* 1890. The learned judge has also held that the plaintiffs have supported their claim to sue on this instrument, under section 87 sub-section 4, which provides that—

“If at the time when any bill of exchange or promissory note comes into the hands of any *bona fide* holder thereof there shall be affixed thereto a proper adhesive stamp or stamps of sufficient amount effectually obliterated and purporting and appearing to be duly cancelled, such bill of exchange or promissory note shall, as far as relates to such holder, be deemed to be duly stamped.”

The facts which I have shortly stated show that the plaintiffs have brought themselves within the protection of this fourth sub-section. It is not disputed that

the plaintiffs are *bona-fide* holders of this note; it is admitted that the stamp is of sufficient amount; it cannot be denied that it is effectually obliterated, and it purports and appears to be (according to the view taken by the learned judge) duly cancelled. Due cancellation consists in the person executing the note signing his name (which includes impressions of the nature here shown) upon the stamp and the true date when such signature and initials of the person who cancels were placed thereon. Now there appears upon this stamp an impression of the name of the defendant company, and the true date upon which the stamp has been cancelled. At all events the stamp purports and appears to be duly marked with the name of the defendant company together with the true date of that marking. Of course the case would be entirely different if this note could be treated as the appellants have treated it, as an instrument not executed by the defendant company, but as a note executed by three persons. The learned judge held that it would be a mistake to hold that the note was executed by any one of these persons. They signed as the agent of the corporation, they were its hand, and it was by means of their affixing their names that the corporation executed this instrument. These directors are not liable on that note. They are acting on behalf of the corporation. It does not bind the directors but the corporation; it is the only person bound by it, and it is the person to cancel the stamp. If the stamp is of the proper amount, if the proper name appears on it, and if the true date of writing such name appears on it or in the hands of a *bona-fide* holder, if the stamp purports and appears to be duly cancelled, then there is a compliance with the provision imposed by this statute. I am of opinion, therefore, that on both grounds the appeal has failed, and that the appeal must be dismissed with costs.

WILLIAMS, J.—Notwithstanding the able arguments addressed to us on behalf of the appellants, with which at the time I felt somewhat pressed, upon reflection I am of opinion that the judgment appealed from should be supported on both grounds. It may be supported under section 87, sub-section 4, which is for the protection of *bona-fide* holders who are protected if the stamp on the face of it is duly cancelled. The stamp need not be duly cancelled in point of fact, it is enough if it purports and appears to be duly cancelled. That is this case. The manager of the plaintiff bank swears that when this note came into his possession it had upon it the stamp which is now attached to it, and that such stamp was in the same condition that it now is, and there was nothing to apprise him that the stamp was not duly cancelled in every respect. It was cancelled by the name of the party who made the note the City and County Property Bank, and bore a date consistent with the note having been made by that party, and therefore, upon the face of it, the plaintiffs are entitled to the protection of section 87, sub-section 4. I wish also to state that the plaintiffs come within the alternative of section 77, which says:—

"An instrument, the duty upon which is permitted or

required by law to be denoted either wholly or partly by an adhesive stamp, is not to be deemed duly so stamped with an adhesive stamp unless the person required by law to cancel"—That is, the person by whom the note is executed—"such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm"

That was done in this case—

"together with the true date of his so writing"

Now that was not done in this case. It is beyond controversy that this note was executed by the defendant bank before the 1st of September, and it is equally beyond controversy that this cancellation did not take place before that date. But the section continues—

"unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time."

Now, I think, reading that section with the case of *Goldberg v. Devlin*, which is an express authority upon the law appertaining to that section, all that has to be proved is this—that the person who relies on the instrument (the plaintiff bank in this case) if he takes and holds a note which does not present on its face a proper cancellation he is subjected to proving to the Court that the stamp was affixed at the proper time and by or by the authority of the proper person. The facts of this case present a weaker case against the plaintiff than the facts before the Court in *Goldberg v. Devlin*, because the stamp on this instrument does not present on its face an improper cancellation. It presents on its face a cancellation which may be a perfectly proper one, so far as the holders are concerned. There is nothing to tell them on the face of this document that it was not executed on the 1st September. The plaintiffs took the note on the 1st of September and discounted it, and when they took it it was in the same condition as it now is; that is sworn to by Mr. Eagar, the manager, therefore to his mind the note presented no irregularity; but in point of fact it turns out that the stamp was not duly cancelled. It was cancelled subsequently to the execution of it by the defendant bank, and therefore the onus is thrown on the plaintiffs to prove that the stamp was affixed at the proper time, that is to say at the time when the instrument was executed. Now, there is ample evidence to satisfy the finding of the learned judge that this stamp was affixed to this note, either before or at the time of its execution, and that being so, the appeal is defeated on both grounds.

HOLROYD, J.—I concur in the judgment of the Court. I was a member of the Court which decided the case of *Goldberg v. Devlin*, and I see no reason to depart from that judgment. To me the last clause of section 77 can bear but one meaning. The word "affixed" means simply put on or fastened to. The word is used in that sense in a number of other sections in the act, and in no other sense. If it had been intended to put any other meaning upon it that would have been so expressed. The words "stamp appearing on the instrument" does not mean the stamp as it finally appears, but as it appears when it was affixed. Interpreting the clause according to the ordinary rules of grammar, it is only necessary to prove that the stamp was affixed at the proper time. With reference

to subsection 4 of section 87, it appears to me that the very skilful argument addressed to us by the appellant would obliterate the maxim *qui facit per alium facit per se*. I do not think that the Stamp Act intended to touch that maxim at all. Now, what is the meaning of "the maker" of a note? It is used in two senses—in one sense where a person himself puts his hand to the document, and in another sense where an agent signs for him; but where an agent signs a promissory-note for his principal the principal is liable at law, and therefore the principal is a person who may cancel the stamp, but I see no reason why the agent should not cancel the stamp for and on behalf of his principal, nor why the principal should not cancel the stamp himself. Under section 48 of the Companies Act, a promissory-note shall be deemed to have been made on behalf of a company if made in one or two ways—if made in the name of the company, or if it is made for or on behalf of and on account of the company by any person acting under the authority of the company. It appears to me that the stamp may be cancelled in precisely the same way. I see no reason why these directors should not have written their names across the stamp, stating that they wrote their names on behalf of the company, that would have been due cancellation, and writing the name of the company across the stamp equally amounted to due cancellation. There was authority to write it, and even if there had been no authority to write it, authority might have been presumed. The holder, when he took the note, had a right to assume that the stamp had been affixed and cancelled and to rely on the maxim *omnia presumuntur rite acta*. I think, therefore, that when this note came into the hands of the plaintiffs, by whom it was discounted, it purported and appeared to be duly cancelled, and accordingly the plaintiffs are protected under section 87 sub-section 4, as well as under the former section 77.

Solicitors, for defendant (appellant) *Hobday*; for plaintiff (respondent) *Attenborough and Co.*

IN CHAMBERS.

Before Holroyd J.

TUNSTALL BRICK AND POTTERY COY. v. MERCANTILE BANK OF AUSTRALIA LIMITED.

21st March.

Rules of Supreme Court 1884 Order III r. 6—Order XIV rr. 1, 2—Specially endorsed writ—Final judgment—Non-service of exhibits—Irregularity—Demand before action—Where, in an application for final judgment, the exhibits referred to in the plaintiff's affidavit, are not served with the affidavit such non service is an irregularity only and can be cured by granting an adjournment—Where in a writ purporting to be a specially endorsed writ, there is a manifest blunder in the particulars, such blunder not

altering the manifest sense of the endorsement held that the blunder did not deprive the writ of its character of being a specially endorsed one—In an action by a customer against his banker for payment of an account current no previous demand for payment is necessary before action; the writ being a sufficient demand.

Application on behalf of the plaintiff company under order XIV. r. 1 for leave to sign final judgment.

It appeared that the defendant was served with a writ on which a statement of claim was endorsed as follows:—

The plaintiff's claim is for money deposited with the defendant as a banker.

1892.

PARTICULARS.

9th March. To amount of account current due by the PLAINTIFF to the DEFENDANT on this date. £234 19 10.

On the 15th March a document purporting to be an amended statement of claim was served on the defendant's solicitor. This document was similar to the endorsed statement of claim with the exception that in the particulars the word defendant was substituted for the word plaintiff; and the word plaintiff was substituted for the word defendant.

The defendant appeared to the writ on the 16th March.

Mr. Mitchell to oppose. There are two preliminary objections to this application. The first is that the defendant has not been served with copies of the exhibits referred to in the plaintiff's affidavit in support of the application as required by order XIV. r. 2. The second objection is that the writ itself is not specially endorsed. The particulars endorsed on the writ are nonsense and if they are not to be looked at the writ is not specially endorsed for want of particulars. *Perry v. Flint*, 9 A.L.T. 99, *Winsor Coffee Palace v. Cheel*, 10, A.L.T. 275. The defendant appeared to the writ as originally served and if that writ was not a specially endorsed writ when the appearance was entered, the plaintiff cannot by any amendment make it into a specially endorsed one so as to enable him to obtain judgment under order XIV. r. 1. *Gurney v. Small*, 1891. 2. Q.B. 584. Further the plaintiff does not show either by the endorsement or by affidavit that there was any demand made for payment by cheque or otherwise before the action was commenced.

Dr. Madden in support. As to the first objection the failure to serve exhibits along with the affidavit in support is at the worst merely an irregularity and not a nullity and therefore if the defendant says he is prejudiced by the non-service the proper remedy would be to grant an adjournment to enable the plaintiff to serve the exhibits. *Edgewcombe v. Taylor*, 8 A.L.T. 14; *Leake v. Field*, 10 A.L.T. 275. But the defendant cannot be prejudiced, for the exhibits referred to are the ledger accounts between the parties and the pay-in slips. As to the ledger account the defendant's bank pass book will give it the information it requires. It also has the original pay-in slips so it cannot require the copies. Endorsed on the affidavit there is an intimation that the documents referred to are in the defendant's own possession. As to the amendment order XXVIII. r. 2 enables the plaintiff to amend his endorse

ment once without leave. The plaintiff has amended under this rule, and, as the defendant appeared after it was served with the amended statement of claim, it must be taken to have appeared to the endorsement as amended. A debtor, when the debt is due is bound to pay without any demand, but in any case the writ is in itself a demand.

HIS HONOR in giving judgment said: This is a summons for final judgment under Order 14, r. 1. The defendant bank did not file any affidavit in reply, but counsel took several preliminary objections. The first objection was that copies of the exhibits referred to in the affidavit filed on behalf of the plaintiff company had not been served on the defendant bank, together with the affidavit. The plaintiff company sues the defendant bank for money deposited with the defendant as banker, and for amount due on current account. The exhibits referred to in the affidavit were the plaintiff's bank pass-book and a book containing the blocks of the pay-in-slips. The ledger from which this bank pass-book was made out, or ought to have been made out, and the actual pay-in-slips are in the possession of the defendant. The fact that copies of these exhibits were not served upon the defendant together with the affidavit would, in my opinion, be a ground for adjournment if the defendant were in any way prejudiced by the omission, and it is possible that the defendant might be prejudiced by the omission to serve copies of the bank pass-book, inasmuch as the plaintiff relies upon the bank pass-book as evidence of the amount of payments made by the defendant on account to the plaintiff out of the money paid in by the plaintiff. If the defendant therefore, requires an adjournment, for the purpose of obtaining this affidavit, I should grant it, but the non-service of copies of these exhibits was an irregularity, in my opinion, and can be cured and is not fatal to the application. Another objection was that the writ of summons had been amended and that the defendant had not been served with a copy of the amended writ, and therefore that there was no foundation for this proceeding as upon the amended writ. I cannot discover from the affidavits that the writ of summons has been amended at all.

What was done was this—a paper purporting to contain an amended statement of claim as endorsed on the writ was served on the defendant's solicitor on the 15th March last. The writ itself had been served previously, and the defendant appeared to the writ on the 16th of March. The statement of claim endorsed on the writ was as follows:—

"The plaintiff's claim is for money deposited with the defendant as banker. Particulars.—1892, 9th March—To amount of account current due by plaintiff to defendant on this date, £234 19s. 10d."

In the document furnished to the defendant's solicitor on the 15th March the particulars had been altered by substituting the word defendant for "plaintiff," and the word plaintiff for "defendant," so that the particulars run—

"1892, 9th March—To amount of account current due by defendant to plaintiff on this date, £234 19s. 10d."

The defendant has appeared to the writ, and the writ was a specially endorsed writ. The particulars, if they

had stopped at the word "due" and had added only the amount, would have been perfectly clear, correct, and intelligible. The words "by plaintiff to defendant on this date" make nonsense of the particulars and represent a thing impossible, and were a manifest blunder. That blunder did not, in my opinion, alter the character of the writ, and I think that blunder might have been subsequently amended, although it has not been amended up to the present. I am inclined to think that I could amend it now. I would hurt no one, and would not alter the manifest sense of the statement of claim. Whether or not, however, it could be amended immediately, is, I think, really not material, for the meaning is so perfectly intelligible, that I think the plaintiff having proved his case by his affidavit is entitled to judgment for the amount endorsed on the writ. The third objection raised was that the defendant bank was sued without any previous demand having been made for the money by the presentment of a cheque. The answer to this is that the writ itself is a good demand. At the same time it seems to me that there is more justice in this than in either of the other two objections, because the plaintiff, by adopting this form of proceeding without having made any previous demand for the money, puts the defendant (if it intends to proceed with the action) to the necessity of paying the costs of the writ. I do not know whether the defendant requires an adjournment. If it does not, I will order judgment for the plaintiff for the amount claimed. [Defendant having intimated that he would like an adjournment, his Honour continued]—I will give the plaintiff 24 hours to serve copies of the exhibits, and I will adjourn the case for two days after service of such copies.

Solicitors; for plaintiff, *W. H. Lewis*; for defendant, *Davis, Price and Wighton*.

(Before Holroyd, J.)

IN THE WILL OF CHRISTINA STURROCK.

22nd March.

Administration and Probate Act 1890 (No. 1060) sec.

23—*Caveat question of fact—Jury—sec. 23 is intended for the assistance of the judge before whom an order nisi, calling upon a caveator to show cause, is heard, so as to enable him, if he so desire, to have the assistance of a jury.—A party to the proceedings is not entitled to apply to have the questions of fact tried by a jury before the hearing.*

Application *ex parte* on behalf of the caveator under sec. 23 of the *Administration and Probate Act*, 1890, that questions of fact, which may arise on the hearing of the order *nisi* calling upon the caveator to show cause why probate should not be granted to the will of Christina Sturrock, should be tried with a jury.

HIS HONOR said,—In my opinion sec. 23 was intended for the assistance of the Judge before whom the order *nisi* is heard, so as to enable him, if he desired to have the assistance of a jury, to order that the questions of fact should be tried by a jury. I do

not think that it was intended that a party to the proceedings should be entitled to make an application for a jury under sec. 23 before the hearing of the order nisi.

Proctor for caveator, *McInerney*.

(Before Holroyd, J.)

UNION TRUSTEE COY. OF AUSTRALIA LIMITED v.
WHITE AND OTHERS.

24th March.

Rules of Supreme Court 1884 Order XVI r. 48 Third Party—Application—An application by the defendant for leave to bring in a third party ought to be made on notice to the plaintiff, and not ex parte.

Application on behalf of the defendants under order XVI. r. 48 for leave to bring in the Bank of South Australia Limited, as a third party to the action.

The application was made *ex parte*.

HIS HONOR,—Ought not the plaintiff to be served with notice of this application?

Mr. Hayes, in support.—The general practice has been to make the application *ex parte*.

HIS HONOR said,—In the case of *Wye Valley Railway Coy. v. Hawes*, 16 Ch. D. 489, Hall V.C., at page 491. "Though I can make the order asked for, I should prefer in this case that notice be given to the plaintiffs. I may say, further that I should be unwilling to give the leave asked for in any case without notice being given to the plaintiffs of the granting of that which might interfere with their action in a very material way. Convenience is all in favor of hearing what the plaintiffs have to say in the first instance, instead of waiting to have the difficulties raised and discussed in a subsequent application. My opinion is, that notice should be given in every case." I think the practice as there laid down is an excellent one to follow. I think a summons should be taken out and served on the plaintiff.

Solicitor for defendants, *Woolcott*.

(Before Holroyd, J.)

L. v. OF VAN DIEMEN'S LAND v. IVEY.

24th March.

Rules of Supreme Court 1884 Order XII r. 8—Order XIV r. 1—Final judgment—appearance—In an application under order XIV for final judgment the production of the duplicate memorandum of appearance, sealed with the seal of the court, is sufficient evidence of the fact of appearance.

Application on behalf of the plaintiff for leave to sign final judgment under Order XIV. r. 1.

There was no appearance for the defendant

The affidavit in support, as to the appearance of the defendant, alleged that the deponent "that he had been informed by his solicitors and believed that an appearance had been entered by the defendant."

HIS HONOR: Ought not the appearance to be sworn to by a person after searching, or at least by the solicitor?

The duplicate memorandum of appearance, sealed with the seal of the Court, was produced, and it was contended that such memorandum was under Order XII. r. 8., sufficient evidence of the fact that an appearance had been entered without any affidavit to that effect.

HIS HONOR said:—I think that under Order XII., r. 8, the production of the duplicate memorandum of appearance, sealed with the seal of the Court, is sufficient evidence of the fact of appearance. I allow the application.

Solicitors for plaintiff, *Malleon, England and Stewart*.

(Before Holroyd, J.)

DOUGHTY & ORS. v. COUNSEL & ORS.

30th March.

Rules of Supreme Court 1884 XII r. 8—Order XIV r. 1—Final judgment—Appearance—In an application under order XIV. for final judgment the production of the duplicate memorandum, sealed with the seal of the court, is sufficient evidence of the fact of appearance—McNamara v. Clarton 12 A.L.T. 135 distinguished.

Application on behalf of the plaintiffs for leave to sign final judgment, under Order XIV., r. 1.

Mr. Pigott to oppose.—There is a preliminary objection. The affidavit in support does not allege that an appearance has been entered by the defendants, and therefore the application should be dismissed (*McNamara v. Clarton*, 12 A.L.T. 135.)

Mr. Fox produced the duplicate memorandum of appearance, and contended that, under Order XII., r. 8, the same was sufficient evidence of the fact of appearance.

HIS HONOR said:—I had occasion last week to consider this matter in the action of the *Bank of Van Diemen's Land v. Ivey* (ante), and I then held that the production of the duplicate memorandum of appearance sealed with the seal of the Court, is sufficient evidence of the fact of appearance. I was not then referred to *McNamara v. Clarton*, (12 A.L.T. 135). On looking at that case it does not appear that the memorandum or any other evidence of appearance was submitted to the learned judge, and that being so I do not think it is any authority for taking the matter out of the provisions of Order XII., r. 8., which I am disposed to think makes the memorandum evidence of the fact of appearance. I disallow the objection.

Solicitors—For plaintiff, *Fox and Overend*; for defendants, *Jamieson*

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Williams, and
Holroyd, J.J.)

ROBERTS V. BALFOUR.

Feb. 19th and 22nd

*Contract for the sale of land. No title as to part.
Compensation.**If a person sells property, representing it to be his own, he contracts impliedly if not expressly that it is his own and is answerable on his contract to the purchaser if it turns out that the property is not his own.**An express stipulation by a vendor that he shall not be liable to make title will take him out of the operation of the above rule.**The different provisions of the contract must be considered as a whole in determining whether the vendor has so expressly stipulated.**A claim for compensation for defective title involves the consideration and its allowance or rejection depends upon the true construction of the contract into which the parties have entered.**A purchaser of land by taking from the vendor a receipt for the purchase-money in order to enable him to bring the land under the Transfer of Land Act does not give up his right to demand a conveyance from the vendor in the event of his being unable to obtain a title under that Act.*

This was an appeal by the defendant from the judgment of Mr. Justice Hood in an action in which the plaintiff sued the defendant for having sold to the plaintiff a block of land, to part of which they were unable to make title. The judgment was for the plaintiff for £100 and costs. The defendant Balfour was one of the executors under the will of one James Phillips. On the 13th November 1887 the defendant Balfour and one Templeton, a co-executor since deceased, acting under the will of the said James Phillips, put up for sale by public auction part of the estate, and the plaintiff became a purchaser of lot 5, for the sum of £1025. Both before and at the sale plans of the lot purchased by the plaintiff were exhibited by the vendors' agent, showing that this lot had a frontage to Stevedore-street of 68ft. 11½in., and a frontage to Melbourne Road of 147ft. 10in., and it was so described in the particulars attached to the contract of sale. In due course the plaintiff asked to see the title, and the defendants produced all the documents of title in their possession, or of which they had any knowledge, which showed a perfectly clear title to the defendant and his co-executor. On the 16th April 1890, the plaintiff paid the balance of the purchase-money due and took a receipt instead of a conveyance, as he intended to bring the land under the *Transfer of Land Act*. Upon, however, endeavoring to bring the land under the Act, the plaintiff discovered that the frontage to Stevedore-street had been conveyed away in the year 1870 by James Phillips,

during his life time, to one James Pearce.

His Honor held that none of the conditions of the contract of sale were sufficiently stringent to protect the vendor from the ordinary rule that a vendor must make title, and he gave judgment for the plaintiff for £100 with costs. Against this decision the defendant appealed.

Mr. Higgins and Mr. Hayes for the appellant.—Compensation cannot be given in a case like this. It could be given for a mis-description, and that is provided for under the contract. The plaintiff should have requisitioned on the title within the time allowed him, under the 5th condition of the contract of sale. Not having done so he is estopped from complaining now. If he had done so then this error would have been discovered, and the defendants could have rescinded the contract. The money has all been distributed to the beneficiaries, and the executors should not now be held liable as they were innocent parties. The plaintiff has taken a receipt for the purchase-money, which practically amounts to a conveyance, and any misdescription is covered by a conveyance. Counsel referred to the following authorities:—*Bruce v. Sturt* 15 V.L.R. 370. *Soper v. Arnold*, 14 Ap. Cas. 429. *Besley v. Besley*, 9 Ch. D 103. *Clayton v. Leech*, 41 Ch. D. 103. *Ashburner v. Sewell* (1891) 3 Ch. 405. *Clare v. Lamb*, L.R. 10 C.P. 334. *Want v. Stallibras*, L.R. 8 Ex. 175, 183.

Mr. Topp and Mr. Weigall for the respondent.—If a vendor cannot make title the purchaser is entitled to take what he can get, and sue for compensation. The acceptance of title does not exonerate the vendor from carrying out his contract. This is not a question of defect of title, which might be cured by conveyance; it is an absolute absence of title. Counsel referred to the following authorities: *Bouman v. Hyland* 8 Ch. D. 588. *Dart's V. and P.* 5th Ed., at pp. 77, 159, 591, 991. *Grassmere Estate Co. v. Illingworth* 15 V.L.R. 687.

Mr. Higgins in reply referred to *Ward v. Dickson*, 5 Jur. N.S. 698, *Att. Gen. v. Sitwell*, 1 Y. & Col. 570, *Boyd v. Dickson*, I.R. 10 Eq. 239.

Cur. ad. vult.
Feb 29th.

THE CHIEF JUSTICE.—This is an appeal from a judgment of Hood, J. The case was argued and determined in the court below apart from the pleadings, and it has been presented to this Court in the same form. The plaintiff bought, at a public auction a piece of land from the trustees under the will of Mr. James Phillips deceased, and he now claims compensation from the vendors, in respect of a portion of the land to which it was found, after the sale and before conveyance, that the trustees had no title. The rule of law on which the plaintiff's claim is founded is well established, and is equally applicable to sales of real and personal property. It is this, that if a person sells property, representing it to be his own, he contracts impliedly, if not expressly, that it is his own and is answerable on his contract to the purchaser if it turns out that the property is not his own. The application of this rule by courts of equity is also

well settled :—

"The rule of the Court," it was observed in *Barker v. Cox*, 4 Ch. Div., 469, "is plain. If a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed, or if not, by compensation to be placed in the same position, in which he would be entitled to stand. In contracts for the sale of real estate an agreement to make a good title is always implied, unless the liability is expressly excluded."—Per Lord St. Leonards, Sugden's V. and P., 14 Ed., 16.

It follows as a consequence of these rules that a claim for compensation, such as that now made by the plaintiff, involves the consideration, and that its allowance or rejection depends upon the true construction of the contract which the parties have entered into between themselves. In the present case the primary judge has held that none of the conditions of this contract says plainly or by necessary implication that the vendors are not bound to make a title at all unless required to do so within the stipulated time, and that the conditions go no further than this, that the vendors are bound to make title, but if no objections are made the purchaser may have to accept an infirm title or possibly merely a possessory one, and he accordingly gave judgment for the plaintiff for £100, that being, in his opinion, a fair compensation for the loss the plaintiff had sustained. We are unable to concur with the learned primary judge in this view of the nature and the legal effect of the conditions of the contract. The contract was made with the plaintiff, on the 15th November, 1887, by the auctioneers, John Buchan and Co., as agents for the vendors. The sale by auction of this and the other properties sold at the same time purported, according to conditions which were read out at the sale, to be by order of "The Trustees, Executors, and Agency Company Limited, on behalf of the trustees of the will of James Phillips, Esquire, deceased." By the tenth condition it was provided that—

"The vendors being trustees will only enter into the usual covenant that they have not encumbered the property." Condition 4 is in these terms :—

"All deeds and documents in the possession of the vendors relating to the title to the property bought by each purchaser shall be produced to such purchaser or his solicitor for inspection, upon his making application for the same to the vendors' solicitors, Messrs. Malleson, England, and Stewart, Queen street, Melbourne, within four days, and the purchaser shall within 14 days from the day of sale deliver to the vendors' solicitors a statement in writing of all objections or requisitions (if any) to or on the title, and all objections or requisitions not included in such statement shall be considered as absolutely waived, and such purchaser shall be considered as having accepted the title."

By condition 7—

"If any purchaser shall within the time aforesaid make any requisition upon the title, or abstract or evidence of title, particulars conditions, conveyance, or otherwise which the vendors shall be unable or unwilling to remove or comply with (which right of election the vendors absolutely reserve to themselves), the vendors may by notice in writing annul the sale, repay the purchase money, and return the promissory notes."

We then come to the 8th condition, a very important

one. It is in these terms :—

"All abstracts of title attested and other deeds or documents whatsoever, whether in the vendors' possession or not, which may be required for verifying the abstract or otherwise, and the searching for, production, and examination of all deeds and documents not in the vendors' possession, and all covenants for the production of deeds or documents whatsoever or which may respectively be required as well under these conditions or otherwise, shall be done and procured by and at the expense of the purchaser requiring the same."

These different provisions of the contract must be considered as a whole, and each of them must be taken in connection with the others. We are of opinion that so taken they amount to an express exclusion of the liability of the vendors to the implied obligation to make a good title. The vendors in plain terms say to the purchaser, "We are trustees only, and we must not be presumed, as an ordinary vendor is presumed, to know our title, and we therefore refuse to incur any liability for the acts of any one, other than ourselves, that may affect the title. We have certain deeds in our possession; whatever title they show you shall have; you must inspect them and you may make requisitions upon them or upon the title generally within a certain time, and if we are unable or unwilling to satisfy your requisitions we shall be at liberty to rescind the contract and repay you your purchase money. But these deeds may not disclose the state of the title when we became owners. The owner from whom we derive our title may have encumbered or may have sold the whole or part of the property; we do not know that he has done so, but we refuse to give a warranty that he has not done so. You, the purchaser, must search the register if you desire to be satisfied upon this point before you accept title, and you must do it at your own expense; we make no engagement to give you a good title in all events or at all, except so far as the title may be affected by our own acts." The plaintiff and the defendants were both honestly ignorant of the want of title to a part of this land down to the time when the discovery was made in the Office of Titles. At that time the trustees' estate had been wound up, and the purchase money of the land had been distributed. If the case could be considered as one in which one of the two innocent persons must be held liable for the loss and expense necessarily flowing to one or the other of them from a given event, it appears to us that the plaintiff and not the defendants should be the sufferer. If the plaintiff, on whom, and not on the defendants, the obligation to search the register lay, had made search within the stipulated time, or at all, the defendants could have rescinded the contract and paid back the purchase money before it was distributed. The plaintiff is seeking to be relieved from the alleged stringency of a condition precluding him from taking objection to the title after the expiration of the period expressly limited, and at the same time to deprive the defendants of their right to rescind the contract. The plaintiff subsequently requested the defendants to give him a receipt for the purchase money to enable him to obtain a title under the Transfer of Land Statute. By so doing, the plaintiff did not give up his right to demand a conveyance from the defendants in the possible event of his being unable to obtain a title

under the statute, but he postponed, by the act done at his request, the time at which the trustees would have been completely protected by the conveyance. In both ways the defendants were placed at a disadvantage, and became liable to embarrassment and expense, if not to actual money loss, by the default and the act of the plaintiff, and he, and not they, should bear the consequences. But the question of legal right in this action must be determined by the conditions of the contract, and the judgment appealed from is erroneous, in our opinion, in holding that the contract gives the plaintiff a right to compensation. The appeal will be allowed with costs. The judgment for the plaintiff will be set aside, and judgment entered for the defendants with costs.

Solicitors for the defendant appellant, *Malleson, England and Stewart*; solicitors for the plaintiff respondent, *Penland, Roberts and Thompson*.

(Before Higinbotham, C.J., Williams and Hood, J.J.)

WATSON & CO. v. RYAN.

March 15th.

Order of commitment—Imprisonment of Fraudulent Debtors Act 1890, s. 22, sub-sec. 2—Amendment of order by Supreme Court—Justices Act 1890 s. 147.

The offence under section 22, sub-sec. 2 of the Imprisonment of Fraudulent Debtors Act 1890 is not complete unless it is proved not only that the defendant had the means to pay, but also that he had the ability to pay.

The Court will not under section 147 of the Justices Act 1890, amend an order of justices unless it be clearly proved to the satisfaction of the Court that there was sufficient evidence before the justices on which they would have been justified in drawing up the order free from any defect.

This was an order *nisi* to review an order of justices at Bendigo. The order complained of was an order of commitment made on the return of a fraud summons taken out by the complainants Watson & Co. against the defendant, Timothy Ryan, the judgment debtor. The order *nisi* to review was obtained on the ground that the order of commitment did not state that the defendant had refused or neglected to pay the amount in respect of which the order of commitment had been made.

Mr. Deakin moved the rule absolute.

Mr. Box showed cause. This order is perfectly good and assuming that it is not, the Court can amend it.

Mr. Deakin in reply. There was no order drawn up in this case; but the minute of the order was defective, in that it did not set out that the debtor had neglected or refused to pay the amount. The court will not amend an order of justices unless it be shown that the justices had power upon the materials before them to make a valid order. *Reg. v. Henson exp. Bond*, 14 V.L.R. 301, *Sutton v. Sarjeant*, 14 V.L.R. 948 and *Reg. v. Hardware*, 10 V.L.R. (L.) 325.

THE CHIEF JUSTICE.—This order is defective in a

material particular. It states :—

"Order for £30 7s., costs £1 11s., to be paid within 14 days to the clerk of petty sessions, in default, to be committed to gaol for one month, it having been proved that the defendant has had means to pay the same."

That is not sufficient. The offence with which the defendant is charged is contained in sub-section 2 of section 22 of the *Imprisonment of Fraudulent Debtors Act 1890* which provides that no order is to be made : "Unless it be proved to the satisfaction of the Court that the person making default in payment of such civil debt, damages, instalment, or costs, either has or has had since the date of the order the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same."

The refusal or neglect to pay is an essential part of the offence created by this sub-section, and the defect in the order is one which, unless it can be cured by amendment, is fatal. It has been contended by counsel supporting the order that it may and ought to be amended by inserting the words that the defendant has had the ability to pay. The power of amending is given by section 147 of the *Justices Act 1890*, which provided that :

"No conviction order or warrant shall be or be deemed to be void by reason of any defect or error in form or substance if upon the return of an order to review it be shown to the satisfaction of the Full Court that sufficient grounds were in proof before the court, justice, or clerk making such conviction or order or issuing such warrant, to have authorised the drawing up thereof, free from such defect; and in such case the Full Court may upon such terms as to payment of costs as it thinks fit, amend the said conviction order or warrant."

We think that the power here given to the Court to correct defects should not be exercised unless it be proved clearly to the satisfaction of the Court that sufficient grounds were proved before the Court below on which that Court would be justified in drawing up an order free from defect. Now, the evidence in this case is very obscure, not only as to the means to pay, but also as to the neglect or refusal to pay, and the explanation given by the chairman of the Bench rather increases the ambiguity. He states—

"That taking cognisance of the fact of the issue and return of the warrant of execution *nulla bona*, and of the service of the certified copy of the minute of the said judgment, which documents were before us, we found that the defendant neglected to pay the amount of the said judgment debt."

That certainly was a very insufficient ground on which this decision of the Bench can be founded, and places a difficulty in the way of this Court to make the amendment applied for. It is entirely consistent with this evidence that this man had not the ability to pay even if he had the means to pay. The application for amendment therefore cannot be granted, and that being so, this is a fatal flaw. The order to review will be made absolute, with costs.

Solicitors for the defendant appellant, *Macboy and Jones*.

Solicitors for the complainants respondents, *Watson*.

(Before Higinbotham C. J., Williams and Hood J.J.)

REGINA v. SURBEY.

March 17th.

Perjury—Registration of illegitimate child—Registra-

tion of Births Deaths and Marriages Act 1890, second schedule.

The particulars required to be known and registered under the second schedule of the registration of Births Deaths and Marriages Act 1890, are particulars with respect to the child whose birth is being registered and whether or not the father is married to the mother of such child, and a conviction of the father for perjury will be sustained if he made a false statement with respect to the above particulars though such statement apart from such particulars was true in fact or was not proved to be false.

This was a question reserved by Mr. Justice a'Beckett for the opinion of the Full Court in accordance with provisions of section 481 of the *Crimes Act 1890*.

Edward Ebenezer Surbey was tried before Mr. Justice a'Beckett at Ballarat on the 16th of February 1892 on the charge of wilfully making a false statement to the deputy-registrar at Ballarat touching the particulars of the birth of a child, that his name was Edward Hobson, and that he was married to Lizzie Hobson at Sydney on the 4th September 1885. It appeared that the prisoner had been employed at and was known in Ballarat by the name of Edward Hobson, and there was no evidence of what his proper name was, and His Honour therefore withdrew from the consideration of the jury the charge of falsely stating his name. It appeared that the accused had been known in Sydney under the name of Surbey, and was there living with a woman whom he called his wife. Subsequently he lived in Ballarat with another woman, the mother of a child. She was called as a witness, and admitted that she was not the wife of the accused. His Honour told the jury to consider whether the accused had, by giving and signing the particulars in question, intended to represent and had represented that he had been married to the mother of the child on the date mentioned, and to find him guilty if they thought he had. The jury found him guilty, and His Honour sentenced the prisoner to two months' imprisonment, but respited execution of the judgment pending the decision of the Full Court on the following question which His Honour reserved, viz., "Was there any evidence of any false statement by the prisoner touching any of the particulars required to be known and registered by the *Registration of Births, Deaths, and Marriages Act 1890* on which the prisoner could properly have been convicted."

Mr. Barrett appeared for the prisoner.

Mr. J. T. T. Smith appeared for the crown.

Mr. Barrett: The words in the schedule are "when and where married," and to this the prisoner answered that he was married in Sydney in September, 1885. That was a perfectly true statement, or at any rate was not shown to be a false one. The Act does not provide in any way for the registration of illegitimate children. This question has not necessarily a reference to the child that is being registered. Suppose a person had been married two or three times he would in answer to that question put down the times when, and places where he was in each case married, and so it is quite certain that some of such marriages could not relate to

the mother of the child being registered. The words "previous issue" contained in the schedule are in favor of this contention, for they surely do not mean previous issue out of the mother of the child that is being registered.

Mr. J. T. T. Smith was not called on.

THE CHIEF JUSTICE: We are of opinion that there was evidence of a false statement touching some of the particulars required to be known and registered under the *Registration of Births, Deaths and Marriages Act 1890* on which the prisoner could properly be convicted. The plain intention of the Act, as well as the express words of it, require the father or mother in registering the birth of any child to give the particulars thereby required, and the particular requirements appearing in the second schedule to the Act, with regard to the time when, and place where the father was married must be taken to be a particular requirement with regard to the child whose birth is being registered, and whether the father was married to the mother of that child. We think that the conviction is right, and answer the question in the affirmative.

Solicitor for the prisoner, *F. Barrett*.

Solicitor for the crown, *Guinness*.

(Before Higinbotham, C.J., Williams, and Hood, J.J.)

HARDIE V. SINGLETON

March 17th.

Medical titles—Medical Act 1890, s. 11.

The use of the term "oculist," coupled with evidence showing an intention to use it as a medical or surgical term or name, is an offence within section 11 of the Medical Act 1890.

The term "oculist" is a word of double meaning, and may be a medical or surgical name or title within the meaning of section 11 of the Medical Act 1890, or it may not be such a name or title.

This was an order to review an order of the justices at Fitzroy convicting the defendant of an offence within section 11 of the *Medical Act 1890*. The defendant, John Wesley Singleton, of Victoria-parade, Fitzroy, was convicted by the justices at Fitzroy for using the term "oculist," he not being a registered legally qualified medical practitioner, and the Bench ordered the defendant to forfeit £5, and £2 2s. costs. The evidence in support of the conviction was that given by the informant, Alfred Hardie, who stated that he went to the residence of Mr. Singleton, and saw there a brass plate upon the door bearing the inscription, "J. Singleton, oculist and aurist." Upon going into the house he asked the defendant whether he was "Dr. Singleton, oculist," to which the defendant replied "Yes." Defendant then asked the informant what was the matter with him, and the informant replied, "My eyes are weak from reading." The defendant then placed him in the light, and told him to close his eyes, after which the defendant made some mesmeric passes across his face. The defendant then placed his hands on the informant's forehead, and,

suddenly taking them off, said, "Did you not feel that shock?" to which the informant answered "No." The defendant then gave him a bottle containing some liquid, and also gave him some pills, for which the informant paid ten shillings. The evidence was corroborated by another witness, and evidence was also given that the defendant was not registered. An order nisi to review the magistrates' decision was obtained by the defendant on the ground that the term "oculist" was not a medical or surgical name or title within the meaning of section 11 of the *Medical Act* 1890.

Mr. Duffy appeared to move the order absolute. There was no appearance to shew cause.

Mr. Duffy.—This conviction is bad. The term oculist does not come within the 11th section of the *Medical Act*. It is not *ejusdem generis* with the terms there set forth. It is not a qualification of any kind, it simply means a healer of the eye. There is no evidence that the defendant intended to use the term as a medical title.

The CHIEF JUSTICE.—The ground upon which this order has been obtained is this, viz., "That the term oculist is not a medical or surgical name or title within the meaning of section 11 of the *Medical Act*, 1890." Now it lies upon the defendant in this case to establish that the conviction is wrong. We do not decide or intend to decide in this case that the term oculist may not be a name which is not a medical or surgical name or title within the meaning of the *Medical Act*, 1890. It is a term of double meaning. It may be such term or it may not be. But it appears from the evidence that there was evidence on which the magistrates could find that the defendant intended to use the term oculist on this occasion as being a medical or surgical name or title within the meaning of section 11 of this Act, because when he was asked whether he was "Dr. Singleton, the oculist," he answered "Yes." Therefore, without deciding that this term oculist is, and must be, in all cases a term within the meaning of this particular section, we think there was evidence that the defendant intended to use the term in that sense, and therefore we think the magistrates were right, and the order will be discharged with costs.

Solicitor for the defendant appellant, *F. J. S. Stephen*.

SUPREME COURT SITTINGS.

(Before Holroyd J.)

MOORE V FERGUSON.

MOORE V. FERGUSON AND MITCHELL.

Feb. 8th.

On motion for judgment upon a referee's report the court in coming to its decision must discard absolutely all exhibits used at the trial before the referee except such as are made part of the referee's report.

A departure from a sealed contract is valid and enforceable when such departure is the wrongful act of the defendant submitted to by the plaintiff and of which the defendant has had the benefit.

The Court will decree specific performance of a parol variation, by agreement of parties, of a sealed contract, when the contract so varied has been fully performed by the plaintiff.

These actions were originally commenced by separate writs but were subsequently consolidated. The statement of claim (specially endorsed on the writ) in the first mentioned action was for work done and materials provided by the plaintiff for the defendant at his request, and for money found to be due on accounts stated, and the claim was for £147 16 5 and interest at the rate of 6% from the date of the writ until payment or judgment. The statement of claim (also specially endorsed on the writ) in the secondly mentioned action was for work done and materials provided by the plaintiff for the defendants at their request: and for goods sold and delivered; and for interest upon money due from the defendants to the plaintiff; and for money due on accounts stated and the claim was for £1616 13s. 8d. less £37 17d. 6d. deductions made by defendants' architect less £1000 cash on account less £59 15s. on contra account by stationery supplied by defendants to plaintiff, leaving a balance due to plaintiff of £519 1s. 2d. And plaintiff also claimed interest at the rate of 6 per cent. on amount of such balance from date of writ till payment or judgment. Subsequently these actions were consolidated, and a defence and counter-claim to such consolidation actions was delivered which stated. 1. In the year 1888, the plaintiff did certain work and supplied certain materials for the defendants under a contract in writing for the erection of a factory, and was paid the full amount he claimed therefor. 2. The defendants have since discovered as the fact is that the plaintiff was paid a sum largely in excess of the sum really due.

PARTICULARS.

Amount of overcharge as follows—

Defendants charges Fair charges

[Then follow a number of items giving the plaintiff's charges under the column "defendants charges," and under the column "fair charges," the amount that the defendants considered a proper charge, showing a total of £1001 8s. 6d. overcharges by the plaintiff.] 3. At the time when the defendants paid the plaintiff for the said work it was agreed that if the defendants found any error in the said account so paid any amount over-paid might be deducted from the amount now sued for. 4. The plaintiff is also indebted to the defendants for goods sold and delivered by the defendants to the plaintiff. Particulars, total £68 6s. 6d. 5. The defendants claim to set off the said two sums of £1001 8s. 6d. and £61 6s. 6d. against the plaintiff's claim. The plaintiff's reply was,—1. Except as to paragraph 4 he joins issue. 2. As to the said sum of £68 6s. 6d. mentioned in paragraph 4 he says that he admits the same, but as to the sum of £59 15s. 0d. portion thereof, he says that he has already given the defendants credit for the same in the above mentioned

action, and the defendants are consequently not entitled to set-off the said sum of £59 15s. 0d. After the close of the pleadings an order of reference was obtained, and the case was referred to a referee; and the following is the referee's report. 1. As to the issues raised by paragraph 1 of the defence and counter-claim I report that the plaintiff did in the year 1888, do certain work and supply certain materials for the defendants, under two contracts, under seal, and dated respectively, May 25th, 1887, and 20th September, 1887, and also certain extras done in connection with such contracts, and the plaintiff was paid the full amount he claimed in respect thereof. 2. As to the issues raised by paragraph 2 of the defence and counter-claim that the plaintiff was paid a sum in excess of the sum that was really and properly due, I find that the sum of £663 7s. 9d. was so paid in excess. 3. As to the issues raised by paragraph 3 of the defence and counter-claim, I report that the plaintiff did on the 21st day of December 1888, agree that if the defendant should find any error in the account so paid, any amount overpaid should be deducted from the amount now sued for by the plaintiff, and signed the following document:—

"Melbourne, Dec. 21, 1888.

Messrs. Fergusson and Mitchell,
Dear Sirs,

In consideration of your giving me your promissory note for £4080 4s. 6d., being balance claimed by me in respect of my contract for buildings on the Yarra Bank, I hereby agree that I will not ask for any payment on account of my contract for the chimney or other works at the said buildings until they are completed and accounts passed by Mr. Clarkson, clerk of the works, and that if any error be found by you in the account for which the said pro. note is given, that any amount over-paid may be deducted by you from any money to become due to me under the contract for the chimney and other works.

James Moore."

4. As to the issue raised by paragraph four of the defence and counterclaim, that the plaintiff was indebted to the defendants for goods sold and delivered by the defendants to the plaintiff, I find that the plaintiff is indebted to the defendants in the sum of L8 11s. 6d.

This report was remitted to the referee for his further consideration, with a direction to state any points of law that were raised before him and to find specially such facts as might be necessary to determine the whole case according to the view which the Court might take on these points, and the following is the referee's special report:—I find the following special facts:—1. The amount claimed by plaintiff under the contracts in writing referred to in paragraph one of the defence was certified to by John H. Grainger as the architect, and was paid to the plaintiff in full, and included all the items set forth in the columns headed "defendants' charges" in the particulars at the foot of paragraph two of the defence. 2. Portion of the work so claimed for was included in the contract of the 25th of May 1887, and other portions were not included in the contracts or either of them, but were in my opinion charged at an excessive price, and for such other portions I have allowed what I consider a fair charge. All my said findings are set

out hereunder, together with special remarks and findings as to certain portions of the work.

Item.	Description of Work.	Plaintiffs Charges.	Special Remarks	Full amount allowed by Referee.
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[Then follows in proper columns a number of items for which the plaintiff had, in the referee's opinion, over-charged to the total amount of L663 7s. 9d., including charges made for work not executed, materials not supplied, and double charges, to the amount of L86 11s. 6d.]

3. At the time when the defendants paid the plaintiff the amount of his said claim, there was an agreement dated the 21st December, 1888, entered into between them which was put in evidence before me and is set out in paragraph three of my former report. 4. The sum of £59 15s. mentioned in paragraph two of the reply was credited to the defendants by the plaintiff in his claim. 5. From and after the commencement of the work, viz., 20th September, 1887, and down to the end of the work, the person actually superintending all works and performing the functions of architect thereto was John H. Grainger. 6. The plaintiff knew of and acquiesced in the said John H. Grainger so superintending all the said works and performing the said functions, and dealt with him as such architect throughout the whole of the work. 7. The said John H. Grainger so superintended the work and acted as architect in relation thereto throughout the whole of the work by the oral direction and with the knowledge and consent of the defendants. 8. Except as aforesaid there was no appointment of any person as architect other than the appointments contained in the contracts of 25th of May, 1887, and 20th September, 1887.

B. The points of law raised before me were as follows:—1. *Mr. Mitchell* on behalf of the plaintiff contended first that the work was done under agreements under seal, and that the rights of the parties under the agreements under seal could not as a matter of law be varied by a mere writing such as the third agreement being the said agreement of the 21st December 1888, and that therefore the third agreement was inadmissible in evidence. He also contended, secondly, that if the said third agreement was admissible, its meaning was simply that if any patent mistake was discovered it should be corrected, but not that where it was a question of amount or allowance or quality, the judgment of some third power should be substituted for that of the architect under the contract.

2. *Mr. Bryant*, on behalf of the defendants, contended, first, that *Mr. Mitchell's* points were not open to him on the pleadings, and, secondly, that they were not tenable as not being good law.

Mr. Mitchell asked that I should amend the pleadings if necessary, and to this *Mr. Bryant* objected. I declined to exercise my jurisdiction (if I possessed any) as to amendment.

On these reports each party moved for judgment, the plaintiff moving first.

Dr. Madden and *Mr. Mitchell* appeared for the plaintiff.

Mr. Isaacs and Mr. Bryant appeared for the defendant.

Cur. ad. vult.

MR. JUSTICE HOLROYD:—The only materials that I have properly before me, on which to found my judgment are besides the pleadings which could be amended if necessary the two reports of the referee and the two contracts annexed to his first report, as therein stated and thereby made part thereof. A number of exhibits were cited and commented upon which, however useful to enable me more readily to apprehend the subject matter of the controversy between the parties, I am bound to discard absolutely in performing my functions as judge. I am no more entitled to regard exhibits not made part of the referee's reports than any of the oral testimony adduced before him. When the cause came on for hearing and before any evidence was taken or point of law argued it was by consent of parties ordered that all issues of fact in the consolidated actions should be tried by the referee; and he made a report, which was subsequently remitted to him for further consideration with a direction to state any points of law that were raised before him, and to find specially such facts as might be necessary to determine the whole case according to the view which the court might take on those points. The second report states the points of law that were raised before the referee and finds certain facts specially; but I must still keep the first report under consideration because the second does not reject it but upholds it, while explaining its meaning. The court was not moved to set aside or remit the second report; and my duty is now to determine those points of law, and those only, which were raised before the referee or which arise upon the pleadings or upon the referee's special findings and subject thereto to accept his findings upon the issues as conclusive. By his first report the referee found that the plaintiff did certain work and supplied certain materials for the defendant under two contracts under seal dated respectively May 25th 1887 and 20th September 1887 and also did certain extras in connection with such contracts, and that he claimed and was paid in respect thereof a sum which was £663 7s. 9d. in excess of what was really due to him. In his second report the referee explained that the amount claimed by the plaintiff included all the sums set forth in the column headed "defendants' charges" in the particulars at the foot of paragraph 2 of the defence; that the amount was certified to by John H. Grainger, as the architect; that from the commencement to the end of the work the person actually superintending all works, and performing the functions of architect, in relation thereto was John H. Grainger, that the plaintiff acquiesced in Grainger's superintendence and dealt with him as architect throughout, and that Grainger so superintended and acted with the knowledge and consent of the defendants, and by their oral direction. By "certified" I must understand the referee to mean properly certified, no objection having been taken to the form of the certificate. The heading "defendants' charges" in the particulars in

paragraph 2 of the defence is an obvious blunder. It should be read "plaintiff's charges." The referee further explained that portions of the work were not included in either of the contracts, by which he obviously meant not included in the contract price, and that for such portions he had allowed what he considered a fair price. It was contended for the defendants that the plaintiff alleged over charges for extras related to extras done in connection with the contract of the 25th May, as would appear to be the case, at least with respect to most of them, and that, under that contract Nahum Barnet was the architect, no provision having been made for the appointment of another architect in the event of his being unable or declining to act, and that consequently upon the issue as to over payment, apart from the agreement set-up by the third paragraph of the defence, Grainger's certificate went for nothing, inasmuch as the substitution of Grainger as architect in the place of Barnet was a departure from the sealed contract. The referee has not expressly stated that this point was raised before him, but his special pleadings indicate that it must have been brought under his notice. It was so little pressed that I scarcely had the advantage of hearing argument either for or against it. If however, there was a departure from the sealed contract, the answer is, either that the departure was the wrongful act of the defendants, to which the plaintiff submitted, and of which they have had the full benefit (see *O'Keefe v. The Board of Land and Works*, 1 A.J.R. 145; *Ford v. Young*, 8 V.L.R. (E.) 93), or that the terms of the deed were varied by a parol agreement between the parties, valid in Equity, and that the contract so varied was fully performed by the plaintiff. (See *Nash v. Armstrong*, 10 C.B. N.S. 259, 262 (per Willis, J.); *Frogley v. The Earl of Lovelace*, John 333; and compare *Thames, etc., Co. v. The Royal Mail, etc., Co.*, 8 Jur. N.S. 100. But the contract of the 25th of May, as I read it, is based upon the assumption that Barnet would be able and willing to act as architect, and I think it contains an implied condition that it should only have effect in that event. It is not an unfair inference, from the conduct of the parties, that Barnet either could not or would not act. Thence it follows that the substitution of Grainger for Barnet was no departure from the original contract, but a new agreement, rendered necessary by the failure of the original contract, and adopting its terms with Grainger's name inserted in the place of Barnet's. I have next to consider the effect of the agreement averred in the third paragraph of the defence, which was put in writing and signed by the plaintiff but not sealed. It is set forth at length in the referee's first report, and is as follows:—

"Melbourne, Dec. 21, 1888.

Messrs. Fergusson and Mitchell,

Dear Sirs,

In consideration of your giving me your pro/note for £4080 4s. 6d., being the balance claimed by me in respect of my contract for buildings on the Yarra Bank I hereby agree that I will not ask for any payment on account of my contract for the chimney and other works at the said building until they are completed and accounts passed by Mr. Clarkson, clerk of works, and that if any error be found by you in the

account for which the said pro/note is given, any amount over-paid may be deducted by you from any money to become due to me under the contract for the chimney and other works.

James Moore."

To defeat this agreement the plaintiff's counsel in his turn availed himself of the common law doctrine, and insisted that the document was inadmissible in evidence as contravening the deed. I am not of that opinion. It may certainly have been a benefit to the plaintiff to get the promissory note although the amount of it had been certified by the architect as payable. The defendants were not bound to pay the amount until the expiration of seven days after the architect's certificate had been presented to them. From the plaintiff taking the note I presume that the giving of it was an advantage to him, and the agreement was therefore good, notwithstanding that it departed from the deed. But upon this construction of the agreement I adopt Mr. Mitchell's argument to a great extent, though not entirely. As to the quality of work or materials, as to how much should be allowed for particular extras, as to whether one kind of material had been properly supplied in lieu of another and what allowance or deduction should be made in respect thereof, I think it was not meant that the judgment of a third person should be substituted for that of the architect. These questions all necessitated the exercise of discernment. But I think it was meant that something more than mere mistakes in the addition of figures should be corrected. If in the account there were charges for works which had never been executed or for materials which had never been supplied or if the same thing was charged for twice over, those were, strictly speaking, errors in the account and quite different from errors of judgment on the part of the architect. If as was to be presumed, the architect had done his duty honestly, they were mere oversights, and I think the parties contemplated that they should be corrected. Thus interpreting the agreement of the 21st December 1888 the defendants are entitled under the 2nd and 3rd paragraphs of the defence to set off against the amount sued for the sum of £86 11s. 6d. Under the 4th paragraph of the defence the defendants are further entitled to set off the sum of £8 11s. 6d. as to which there has been no dispute. The set off reduces the plaintiff's claim to £571 14s. 7d., and I direct judgment to be entered for the plaintiff for that amount with costs of the action excepting the costs of the trial by the referee and I order that the parties respectively pay their own costs of that trial.

Solicitors for plaintiff *Gillott, Croker, Snowden and Co.*

Solicitors for defendants *Davies, Campbell and Davies.*

(Before Holroyd, J.)

CHAMBERLAIN AND ANOR V. THORNTON AND OTHERS.

Feb. 9th, 11th, 12th.

Contract—Mutual mistake—Rectification.

Rectification of a written instrument on the ground of mutual mistake will not be granted by the Court, unless it be proved convincingly that the mistake was mutual; suspicion, even strong suspicion, is not sufficient.

The Court will not vary a written instrument on the ground of plaintiff's mistake, unless it be shown that the error was induced by some statement or conduct of the defendant.

Quere whether the Court will not reform a contract, required by law to be in writing, and enforce specific performance of it where a plaintiff has been drawn into executing it by a mistake as to its contents willfully induced by the defendant, and has fully or even in great part performed what owing to such mistake he conceived to be the contract.

Money paid to A, in pursuance of a contract for the supply of gravel to him in excess of the value of the gravel supplied, cannot be recovered back when such over-payment was not made under a mistake of fact, but was made because A could not make up his mind whether he would continue taking the gravel or not.

This was an action by Robert Chamberlain and George Elliott against Thomas Thornton, William Thornton, and John Thornton, trading as Thornton and Co., and was for the rectification of a written agreement on the ground of mutual mistake, for accounts and for payment under the instrument when rectified. The Statement of Claim stated that the plaintiffs were the owners of certain land, and that the defendants were railway contractors, and that on or about the 14th January 1890 it was verbally agreed between the plaintiffs and John Thornton, on behalf of the defendants, that the defendants should take any quantity of gravel from the plaintiffs' land at the rate of fourpence per cubic yard. That such verbal agreement was on the 14th January 1890 reduced into writing, wherein by mutual mistake it was provided that payment for the gravel should be at the rate of fourpence per square yard instead of fourpence per cubic yard. The statement of claim further alleged that the defendant had taken and removed large quantities of gravel from the plaintiffs' land since the 14th January 1890 but save for the payment of £300 on account thereof on the 2nd October 1890 had not paid the plaintiffs therefor and the plaintiffs claimed.—

1. Rectification of the document dated 14th January 1890.

2. An account of all gravel taken by the defendants their servants, agents, or workmen, from the plaintiffs' land and that the defendants might be ordered to pay the plaintiffs for the said gravel at the rate of fourpence per cubic yard.

The defence was that there had been no mutual mistake; that the plaintiffs were not after so long a lapse of time entitled to have the contract rectified, that parol evidence could not be given to vary the written agreement and that the plaintiff could not have rectification and an order for payment at the rate of fourpence per cubic yard and the defendants counter-claimed for £100 15s. the difference between £300

which they had paid to the plaintiffs and £199 5s. the value of 11955 square yards of gravel at fourpence per square yard which quantity they admitted they had taken from the plaintiffs' land. In answer to this counterclaim the plaintiffs pleaded that this payment of £300 was a progress payment on account of gravel taken and estimated at fourpence per cubic yard.

The remaining facts as found on the evidence appear in the judgment.

Dr. Madden and Mr. Bryant appeared for the plaintiffs.

Mr. Isaacs and Mr. Cussen appeared for the defendants.

At the close of the plaintiffs' case *Mr. Isaacs* moved for a nonsuit. There is no case. The application is to reform a contract. Equity will rectify a document but not a contract *McKenzie v. Coulson*, L.R. 8 Eq. 368 and at p. 375. All that has been proved is that the plaintiffs misunderstood the meaning of the word square. It has not been shewn that they were led into that mistake by the defendants, and if this be so the plaintiffs must fail *Smith v. Hughes*, L.R. 6 Q.B. 597. *Picturesque Atlas Co. v. Phillipson*, 16 V.L.R. 675; *Johnson v. Donaldson*, 6 V.L.R. (Eq.) 121, 123. The Statute of Frauds is a bar to this claim. *Lavery v. Pursell*, 39 Ch. D. 508; *Lucas v. Dixon*, 22 Q.B.D. 357; *Guest v. Watson*, 13 A.L.T. p. 66. In no case will equity reform a contract and then grant specific performance of it in the same action *Story's Equity Jurisprudence* Vol. I s. 161. *Olley v. Fisher*, 34 Ch. D. 367. This can only be done where the Statute of Frauds in no bar *Harris v. Pepperell*, L.R. 5 Eq. 1. The delay here is a bar to the plaintiffs' claim.

His Honor refused to nonsuit and the defendants case was gone on with.

Cur ad vult.

March 15th.

MR. JUSTICE HOLROYD: The evidence in this case is full of contradictions, and I do not trust entirely to the memory of any of the witnesses. They have mixed different conversations together, and altered the order of events. I believe, however, that when the plaintiff Elliott directed that the words "square yards" should be inserted in the written contract, he supposed a square yard to signify as he expressed it, a yard every way, that is, a cubic yard; and that, before the document containing the contract (Exhibit D) was either signed or written, it had been verbally agreed between him and the defendant, John Thornton, that the defendants should pay for the gravel taken by them at 4d. per cubic yard, which agreement both parties intended should be reduced to writing. I do not believe that John Thornton was present when this document was being written out by Gott, Elliott's clerk, or when anything was said about the meaning of a square yard. Elliott does not pretend that he was. Only Gott asserts it, and his memory was in my opinion as defective as that of any of the other witnesses, although he gave his evidence glibly enough. There are circumstances in John Thornton's subsequent conduct, and passages in the correspondence on which to found a suspicion, that John Thornton, when he

signed the document for his firm, really intended to bind his firm to pay by the cubic yard, and had not perceived the substitution of the word "square" for "cubic." But suspicion, even strong suspicion, is not enough. The proof of the mutual mistake should be convincing. John Thornton has sworn that before signing the document he observed that "square yard" had been inserted in it in lieu of cubic yard and that he supposed the plaintiffs to have made the alteration because in their opinion the gravel would not average a yard in depth. I could not say with confidence that this statement was untrue. His own reason for accepting the alteration, that he thought he should get the best of the bargain, is highly probable. There is nothing to show that he knew, although he may have surmised, that Elliott had committed a blunder, and therefore have kept silence, resolving if blunder there were, to take advantage of it. But he had done nothing to lead him into error. It was Elliott's own blunder. His distrust of John Thornton prompted him to reject the plain words which John Thornton had suggested. If Gott had any such conversations as he alleges with Robert Thornton about the measurement of the gravel, they are explainable by the fact that Robert left the arrangement of the whole business to his brother John, that he knew the terms which his brother had been offering, but had never been told what he had actually accepted. If, as I have concluded, there was no mutual mistake and the error of the plaintiff Elliott was not induced by any statement or conduct of the defendant John Thornton, it is clear that the written instrument cannot be rectified. Rectify is not exactly the right word to use. It would be more correct to say the written instrument cannot be varied by the Court. There is nothing by which to rectify it. In the action therefore the defendants must have judgment. It has not been necessary for me in this case to consider the argument, which was pressed upon me, that, where the mistake is only unilateral, a Court of Equity will never reform an instrument which the law requires to be in writing, and then enforce specific performance of it. But I am not prepared to lay that down as a general rule. I think there have been cases in which, where a plaintiff has been drawn into executing an instrument by a mistake as to its contents wilfully induced by the defendant, and has fully, or even in great part, performed what owing to such mistake he conceived to be the contract, the Court has reformed the instrument, and compelled the defendant to perform his part of it in the sense in which the plaintiff understood it, notwithstanding that the contract was one which required to be in writing. The defendants have put in a counterclaim for £100 15s., the difference between £300 which they paid to the plaintiffs and the value of the gravel taken out by them, according to their estimate of the quantity at 4d. per square yard. They seek to recover this sum as money paid under a mistake of fact. But, according to his own account, John Thornton was not labouring under any mistake when he sent the plaintiffs the £300. He then intended to continue to use

the plaintiffs' pit for some time longer; and it was for that reason, and not because he thought he had already taken gravel of the value of L300 at 4d. per square yard, that he deemed himself safe in sending that sum. The plaintiffs were pressing for payment and he had a rough estimate made of the quantity extracted, but did not have the pit then measured. The Court was not informed to what the estimate amounted, but we may fairly conclude, as it would not have been safe to pay L300 upon it, that it was rather under than over the mark. Subsequently, John Thornton changed his mind, and suspended operations in the plaintiffs' pit. What he has proved is that the over-payment was not due to any mistake of fact on his part, but to his not knowing his own mind; and I think his counterclaim must fail. I shall therefore direct judgment in the action to be entered for the defendants with costs, and on the counterclaim for the plaintiffs with costs.

Solicitors for plaintiffs, *Gillott, Croker, Snowden and Co.*

Solicitor for defendants, *Ford.*

(Before Holroyd J.)

THOMAS V. IVEY.

March 25th.

Licensing Act 1890 (No. 1111) s. 148—Honest refusal to admit a constable into a hotel bar is not wilfully delaying admittance.

Order to review order of Justices.

The defendant John Ivey was licensee of the Metropolitan Hotel William-street. On Sunday 28th January last Sergeant Hayes demanded and obtained entrance to the hotel, and then demanded that Ivey should unlock the bar door; this Ivey refused to do and also refused a further demand to give the key of the bar to Hayes in order that he might open the bar door. Ivey was then charged on information under s. 148 of the *Licensing Act 1890*, with wilfully delaying admittance to the police. Ivey swore that he believed he was justified in refusing to open his bar door on Sunday. The justices on the 28th January dismissed the charge.

Mr. Duffy to show cause. The defendant is prohibited by section 143 from opening his bar door on Sunday. There are two offences under section 148 refusing admittance and wilfully delaying admittance. If there was any offence here it was the former and not the latter. If the licensee believes that he is justified in refusing admittance he does not do it "wilfully" within the meaning of section 148; *Buttens v. Justices of Melbourne* 16 V.L.R. 604.

Mr. Box to move the order absolute. "Premises" in section 148 includes every part of the premises, the bar among others.

Holroyd J.—I think an honest refusal to give the sergeant admittance to the bar cannot be construed into a wilful delay of admittance within the meaning of section 148. The constable on that

refusal might have broken in at once. A clear distinction is drawn between refusal and wilful delay and for a sufficient reason. There is an undoubted risk that if a landlord admits a policeman into the bar on Sunday, he may, on the entrance of another policeman, be called upon to show that he was not guilty of Sunday trading. I think if a policeman were within the bar, that, according to the language of the act, would be *prima facie* evidence of the sale of liquor. There is no exception, save of the licensee his agent or servant, and I cannot create exceptions. I can also very well understand why there should be no exception. It might be very convenient for a constable to get a landlord to admit him into the bar for the purpose of convicting him of the offence of Sunday trading. The order must be discharged with costs.

Solicitor for informant, *Crown Solicitor.*

Solicitor for defendant, *Mr. Moloney.*

Before Holroyd, J.

REG. V. BELL AND OTHERS.

18th, 25th March

Licensing Act 1890, (No. 1111) s. 25—"Township" in that section means an aggregation of dwellings larger than a village—This definition is not satisfied by a township proclaimed as such by the Governor-in-Council but containing no dwellings.

Order to review order of justices. The facts fully appear in the judgment.

Mr. Crussen moved the order absolute.

Mr. Serjeant to show cause.

Cur. Adv. Vult.

HOLROYD, J.—This was an order *nisi* calling on the licensing magistrates for the licensing district of Woodside, the receiver and paymaster at Port Albert, and one William George Greenwell to show cause why the certificate granted and issued by the licensing magistrates on the 7th of December last to authorise the issue of a roadside victualler's license to the said William George Greenwell for certain premises situated at Carrajung, in the licensing district of Woodside, the duplicate of such certificate, and the license issued thereon should not be quashed, on two grounds—first, that the magistrates had no jurisdiction to grant or issue the certificate; and secondly, that on proof at the hearing that Carrajung was a township the jurisdiction of the licensing magistrates to issue a certificate for a license was ousted. The question of the magistrates' jurisdiction depends entirely upon the meaning of the word "township" as used in the 25th section of the *Licensing Act 1890*. Another point appears to have been raised, but before me it was abandoned. By the 25th section it is enacted that the Licensing Court for any licensing district may grant roadside victuallers' licenses in excess of the statutory number of victuallers' licenses to any person who are in the opinion of the Court, fit and proper persons, and who keep houses within such licensing district

containing sufficient accommodation for the probable requirements of the public travelling in that locality, but such houses must be situated in mountainous districts not within 10 miles of any village or township, and at least 10 miles distant from the nearest licensed victualler's house which at the time of the issue of the license affords accommodation to the public travelling along some road to be measured along such road. It was argued in support of the license that a "township" in this section does not signify a township on paper, but a real town, that is to say, a collection of houses larger than in common parlance is understood by the word village, and that this interpretation of the word is strengthened by its being placed in conjunction with "village." On the other hand, it was contended that "township" signified land proclaimed as a township under section 16 of the Land Act 1890, or under section 73 of the same act. The first part of section 16 is as follows:—

"The Governor in Council may subdivide any county into parishes and townships, and by proclamation to be published in the 'Government Gazette' may define the boundaries of such parishes or townships, and may distinguish each by a name; and after such proclamation the territory comprised within the boundaries of any of the said divisions shall thenceforward be recognised as a parish or township by the name so given as aforesaid."

By section 73—

"The Governor in Council may from time to time, by a notice in the 'Government Gazette,' proclaim as a township any portion or portions of Crown lands, and the lands in such township . . . shall be sold by auction," &c.

Carrajung was proclaimed a township under the 73rd section of the *Land Act* 1890 by proclamation published in the *Government Gazette* of the 14th of May, 1886. It was proved to the magistrates' satisfaction that there was no "actual township," by which expression the magistrates meant town, at Carrajung; that at the time of the application and for some time previous no accommodation was or had been afforded for the travelling public in that locality, and that a necessity for such accommodation existed. It was also proved to their satisfaction that all requirements as to notices had been complied with; that the applicant was a fit and proper person; that he kept a house within the said licensing district which, in the opinion of the Court, contained sufficient accommodation for the probable requirements of the public travelling in the locality; that such house was situated on the coach road from Rosedale to Yarram Yarram, in a mountainous district, and distant 10 miles or upwards from any village or township (construing "township" in the sense contended for by the applicant) or any licensed house. It further appeared that for a period of about five years previously to the date of the application for a license only two dwelling-houses existed in the township proclaimed as Carrajung, but that several of the township allotments had been sold, and a mechanics' institute erected. I have no doubt that if I quash Mr. Greenwell's license I shall be depriving travellers who have occasion to pass through the mountainous regions about Carrajung of that accommodation which the Legislature, in enacting the 25th section, intended to enable persons travelling in such

districts to procure. The prohibition against granting a roadside license for a public-house within 10 miles of a village or township, or within 10 miles of the nearest licensed house on the same road, was designed to prevent the establishment of such roadside houses in places within a reasonable distance from which the necessary accommodation could be obtained elsewhere, and not in places within a reasonable distance from which no such accommodation could be procured. The question is whether the Legislature has expressed the prohibition in terms so stringent as to defeat its own object. According to the dictionaries a town imports in its general sense a collection of houses larger than a village. But it has several special significations, and amongst them in this colony that of a borough which has been declared by an order of the Governor-in-Council to be a town. Similarly, a township is defined as the district or territory belonging to a town; and under the Land Acts the term is certainly applied to the territory appropriated by the Governor-in-Council for a town that is to be created, as well as for one already in existence. But with us "township" is used colloquially to denote any cluster of dwellings, from a small town to a hamlet. It is usually qualified by one or other of such adjectives as "large," "small," "good-sized," "considerable," which express in a rough way different sizes. By itself it is more nearly synonymous with village than with any other word, village being a word not at all in fashion in Victoria. In the 25th section of the Licensing Act, from the word "township" being connected with, but distinguished from village, and placed first in order, I conclude that it means an aggregation of dwellings somewhat larger than a village. Perhaps it was because amongst the mountains in Victoria there is no place worthy of the name of town as commonly understood that the word "township" was used in preference. In my opinion the magistrates had jurisdiction to grant the certificate for the issue of a license to Mr. Greenwell, and his license is valid. I discharge the order *nisi* with costs.

Solicitor for the Crown, *Crown Solicitor*.

Solicitors for the applicant, *Serjeant and Pace, Sale*.

DIVORCE AND MATRIMONIAL CAUSES JURISDICTION.

(Before a'Beckett J.)

HUMPHRIES v. HUMPHRIES.

Feb. 26th.

Dissolution of marriage on the ground of desertion will not be granted while an uncanceled deed of separation executed by the parties, remains in existence, provided that the right to relief had not accrued prior to the execution of the deed.

This was an undefended suit for dissolution of marriage heard by Mr. Justice a'Beckett in Bendigo on the 26th February 1892. The ground of the petition which was presented by the husband, was for

desertion by the wife, but it appeared that shortly after the desertion complained of, the petitioner had signed a deed of separation, which, up to the date of the institution of the suit was unrevoked.

Mr. Helm in support of the petition. This deed was obtained by surprise. There was never any deliberate consent given by the petitioner to the respondent to live apart from him. Counsel referred the court to *Moore v. Moore*, L.R. 12 P.D. 193, *Parkinson v. Parkinson*, L.R. 2 P. & D. 25, and *Nott v. Nott*, L.R. 1 P. & D. 251.

Cur. ad. vult.

March 9th.

MR. JUSTICE A'BECKETT.—This is an undefended suit for dissolution of marriage by the husband, on the ground of the wife's desertion. The marriage was in January, 1879. About a year after it, the respondent withdrew from cohabitation against the husband's wish, under circumstances sufficient to constitute desertion. After this desertion had continued about four weeks the petitioner signed a deed under circumstances detailed as follows in his evidence:—

"Conant, a solicitor, called me into her house. Had no conception before that of any deed. Had given him no instructions. Saw Conant and her. He said he was instructed by her to draw a deed of separation, and would I sign it. At first I said I wouldn't. I said to wife 'if it's your wish I'll do so.' I don't remember the purport or effect, except that I was not to interfere in her business or with her. It was read to me by Mr. Conant. It was already prepared. I had not a quarter of an hour's consideration. I was never asked to pay for it. I never saw a copy or asked for one. She went away a few days after that. Never paid any money to her since. She never asked for money."

In his affidavit in support of the petition he refers to the deed as follows:—

"11. That the said respondent had a deed of separation drawn up by a solicitor, who induced me to sign the same. I have no copy of the deed, and so far as I can recollect, it provided that the said respondent and myself should live separate and apart from each other, and that she should earn her own living and support her own children, and that I should earn mine and support my own children."

"12. That there was no monetary consideration whatever contained in the deed, and I have never paid her any money since, either directly or indirectly, for her maintenance and support."

The execution of this deed, which the petitioner very properly brought under the notice of the Court, creates a difficulty which the petitioner's counsel attempted to get over by suggesting that he should not be held bound by the deed; that it was obtained by surprise, and did not indicate any deliberate consent to the wife living apart. He also referred to the case of *Moore v. Moore*, L.R. 12 P.D. 193, in which a deed of separation was held not to bar the wife's right to relief on the ground of her husband's desertion. The distinction between that case and the present is that in *Moore v. Moore* desertion for two years had given a right to relief on that ground before the deed was executed. In *Parkinson v. Parkinson* L.R. 2 P. and D. 25 a deed executed within the two years was held to bar the wife's right to complain of desertion. The case nearest to the petitioner's is *Nott v. Nott* L.R. 1 P. and D. 251, but is distinguishable from it. The petitioner, by the deed executed in this case, which was left in the wife's possession, led his wife to sup-

pose that he did not object to her thenceforth living apart. He never recalled the consent given by the deed, or told his wife that he would not be bound by it, or requested her to return to him after its execution. He may have executed it improvidently, but I hold it to have been effectual to terminate the desertion, which had continued up to the date of its execution. I therefore dismiss the petition.

Proctors for the petitioner, *Motteram and Hyett*.

(Before Holroyd, J.)

PICAUD v. PICAUD.

March 8th.

The Court will not grant a decree nisi for the dissolution of marriage where the only evidence, that the person served with the petition is the petitioner's wife, is the uncorroborated evidence of the petitioner himself.

This was an undefended suit for dissolution of marriage on the ground of the wife's adultery. The petition was presented by the husband.

Mr. Woolf, who appeared for the petitioner, in opening the case stated that the respondent had been served with the petition by the proctor for the petitioner in the following manner, viz.—The proctor in company with the petitioner had gone to the house where the respondent was living, and that the petitioner had then pointed out the respondent as his wife, and thereupon the proctor had served the respondent with the petition.

MR. JUSTICE HOLROYD.—Is there not a case which lays down that the uncorroborated evidence of the petitioner as to the identity of the respondent and correspondent is insufficient?

Mr. Woolf.—That is the case of *Russell v. Russell*, 4 A.J.R. 183; but all the Court has to be satisfied with is that there is no collusion.

HOLROYD, J.—[The object of the rule, that the Court will not take the uncorroborated evidence of the petitioner as to service, is to avoid collusion. However, I will hear the evidence, though I am not certain that I shall grant the decree.]

Evidence in support of the case was then given, and the evidence as to service was that the proctor for the petitioner had, in company with the petitioner, gone to a certain house, and that the petitioner had pointed out a woman there whom he said was his wife, and that the proctor, to whom the woman was a perfect stranger, had served her with the petition. The proctor deposed to these facts and also to the fact that the woman admitted that she was Mrs. Picaud. The petitioner himself also deposed to the above facts, and swore that the woman served was his wife.

HOLROYD, J.—There is no evidence of identity that the woman served with the petition was Mrs. Picaud, excepting the petitioner's own evidence.

Mr. Woolf.—There is evidence that the woman admitted in the presence of the petitioner's proctor that she was Mrs. Picaud.

HOLROYD, J.—All that goes to show is that some woman said she was Mrs. Picaud. A statement, not on oath, so that leaves us where we were before.

Mr. Woolf.—If the Court is satisfied with the evidence, that is all that is necessary. There is no rule of law requiring the petitioner's evidence to be corroborated in every particular. *Cremar v. Cremar*, 12 V.L.R., 738.

HOLROYD, J.—I am not satisfied that the proper parties have been served, and with respect to the service the Full Court, in that case of *Russell v. Russell*, has laid down a rule which has been frequently followed, and which I have never voluntarily departed from. If the service were satisfactorily proved, I would be disposed to accept the evidence proving the adultery.

Mr. Woolf.—This rule has frequently been departed from, and Mr. Justice a'Beckett and Mr. Justice Hodges have both granted decrees on similar evidence of identity as that adduced in this case.

HOLROYD, J.—This is a rule of the Full Court, and until the Full Court overrules it I do not feel myself justified in giving the go-by to it, especially as it has been followed again and again.

Mr. Woolf.—I would ask, then, that the matter be allowed to stand adjourned in order that we may be allowed to adduce if possible further evidence on this point.

The case was then adjourned, and on a subsequent day further evidence of the identity of the respondent as Mrs. Picaud, corroborating the evidence of the petitioner, was given, and a decree *nisi* was granted.

Proctor for the petitioner, *Waller*.

(Before Holroyd J.)

NEILSON v. NEILSON.

March 1st.

Marriage Act 1890, s. 74—Desertion.

When a wife leaves her husband against his will, though his cruelty may have afforded her a good excuse for so doing, quere whether this constitutes an act of desertion on the part of the husband.

If during a temporary suspension of cohabitation mutually agreed upon, the respondent has been guilty of unequivocal acts demonstrating that he has taken advantage of it to break off his connubial relations and has deserted his wife, desertion will be deemed to have commenced from the time of the commission of these acts.

This was an undefended suit for the dissolution of marriage by a wife against her husband, on the ground of wilful desertion for a period of three years and upwards.

The facts appear in the judgment.

Mr. Lewis appeared in support of the petition, but at the conclusion of the evidence His Honour intimated that he was not satisfied without authority that the facts proved amounted to desertion, and adjourned the case in order that counsel might look into authorities.

March 21st.

Mr. Lewis: The question is whether the separation under the circumstances of this case can amount to desertion, that separation having been brought about by the misconduct of the husband. On the point of an innocent party leaving her husband for cause, I would refer the court to *Bishop on Divorce*, Vol. 1, 791, s. 662. Then there is the case of *Hodges v. Hodges*, 1 Esp. 441 which was an action for necessities, where the wife had been compelled through the cruelty of her husband to leave his house. I would also refer the Court to *Ward v. Ward*, 1 Swab & Trist 185; *Thompson v. Thomson*, 1 Swab & Trist 231; *Cargill v. Cargill*, 1 Swab and Trist, 235; and *Moncrief v. Moncrief*, 5 A.L.T. 192. This last case was an order for maintenance, and appears to lay down the rule that where a wife has had to leave her husband on account of his cruelty that amounts to a desertion in a claim for maintenance. A husband owes his wife not only support but also his society and protection. *Nimmo v. Nimmo*, 3 A.J.R. 132; *O'Connor v. O'Connor*, 12 V.L.R. 324; *Wilkinson v. Wilkinson*, 13 V.L.R. 568. I would also refer the Court to *Williams v. Williams*, 3 Swab & Trist 548; *Yeatman v. Yeatman*, L.R., 1 P. & D. 489; *Fitzgerald v. Fitzgerald*, L.R. 1 P. & D. 694. [Holroyd, J.—Assuming that the wife has been driven away from her home by acts of her husband such as would justify her in leaving him, and then subsequently a mutual agreement has been entered into between the parties that the wife shall continue to reside with her mother until she shall have recovered from some disease from which she is suffering, such as was proved in this case, can there be said to be desertion while such an agreement lasts?] After the petitioner was driven away from her home there is no evidence of any intention on the part of the respondent to take her back and provide a home for her.

Cur. ad. vult.

March 25th.

MR. JUSTICE HOLROYD.—A petition by a wife against her husband for dissolution of marriage on the ground that he had without just cause or excuse wilfully deserted her, and without any such cause or excuse left her continuously so deserted during three years and upwards.

On the 27th of July 1888 the petitioner, then Alice Esta Matthews, was married to the respondent John Marius Neilson, and after the marriage the two lived together as man and wife up to the month of September 1888 at Ascot Vale, where the respondent carried on a grocer's business. The respondent began to illtreat his wife shortly after they were married. He used to beat her, sometimes with a stick, and sometimes with his fists. On Sunday, the 1st of September, she accused him of suffering from a disease. He denied it, they quarrelled and he assaulted her. He hit her across the face with a walking cane, and on the ear with his fist. Then he hit her across the face with a deal board. Her face was severely bruised and bled. Afterwards he threw her on the floor and kicked her. She was

disfigured and much hurt. In consequence of this assault she left his house and went to a neighbour's. There she stayed two days and then removed to the house of her sister, Mrs. Regan, at South Melbourne. She swears that she was afraid to return to her husband. For this assault the respondent was brought before the Court of Petty Sessions at Flemington on the 11th of September, and bound over to keep the peace for six months. The petitioner remained some weeks at her sister's confined to her bed by this disease, and during that time her husband came once to see her, invited by her sister. She told him that she herself was suffering from the disease; and he replied that he could not believe it, but would consult a doctor. Her sister corroborates her as to the alleged illtreatment, and as to the fact of her suffering from some disease. The petitioner and her sister were the only two witnesses, and neither of them has characterized the disease by name or description; and I have been left to guess that it was venereal. There is no evidence beyond the fact of the wife's having been afflicted with the disease, that it was communicated to her by her husband, but I believe it was, although not knowingly. The respondent's illtreatment of his wife frightened her into quitting him for a time, but I should infer from the whole of the evidence that it was not actuated by the design of getting rid of her or compelling her to leave him. The petitioner, although at first afraid to return to the respondent, soon ceased to be so. On the 17th of November 1888, she went home to her mother's, not being then completely recovered. Just before going she met her husband in the street. He asked "Are you better?" She said "No I'm going to my mother's at Warrnambool, until I am able to come back to you." He said "It is right you should go. I've been to the doctor's and the doctor told me that you were unfit to live with me for some time." It would seem from this statement of the respondent, passed in silence by his wife, that both had consulted the same doctor, but it does not otherwise appear that either of them had consulted any doctor. The evidence is extremely meagre and vague, but I conclude that the separation between the husband and wife was at this time continued by mutual consent, with the intention that as soon as the petitioner was well enough cohabitation should be resumed. The petitioner did not recover from her illness for a twelve-month. About six months after she went to Warrnambool, that is in May 1889, she received a letter from the respondent which she destroyed. In it he said he had sold his business and intended to travel with the money. In August, 1889, he committed an assault on a woman, for which he was sentenced to three months imprisonment. His wife heard of his arrest on this charge. On the 23rd of January, 1890, the respondent wrote to the petitioner addressing her as his dear wife, and describing himself as her heart-broken husband, informing her that he was out of gaol and was trying to get something to do, and begging for a loan of £10, to be raised on her jewellery. To that letter she sent no reply. On the 13th of Novem-

ber of the same year she received another letter from him, commencing, "My dear wife, is there any hope of a reconciliation between us? I've tried to turn from you but I cannot, my only hope of future prosperity depends on you," and containing many professions, not easy to believe of intense affection. In that letter the respondent begged the petitioner to return to him and offered to guarantee her from £2 10s. to £3 a week as long as he lived. The petitioner did not reply to this letter. She assigns as her reason, that before she had time to decide what reply she should make, she saw in a newspaper that her husband had been arrested on another charge of assaulting a girl. It appears that the respondent was tried upon a presentment for an assault with intent to commit a rape, was found guilty of a common assault and sentenced to be imprisoned with hard labor for two years. The offence was alleged to have been committed on the 17th of November. There is no evidence to show whether the respondent did or did not contribute anything to the support of his wife from the time when she left him, nor whether he ever visited her after she went to her mother's house in November, 1888.

Upon the foregoing facts I think that the desertion alleged has not been proved. The time when the respondent sold his business has not been fixed, but it must have been either in or shortly before the month of May, 1889. From November, 1888, until that time I can find no indication of an intention on his part to desert his wife, and even the sale of his business and his resolution to travel are not inconsistent with willingness to receive his wife and to work for her support as soon as she should be in a fit state to resume cohabitation with him. The wife in the first instance quitted her husband against his will; and though his cruelty afforded her a good excuse for so doing, I entertain grave doubts whether this constituted an act of desertion on his part. Afterwards, when her fear had abated, she resolved to remain apart from him until she was cured of the disease with which she was affected. If he had communicated to her a venereal disease, although unwittingly, I think that in this resolution also she was fully justified. But at this time she intended to return to him, and he was desirous that she should, and was willing to receive her. Co-habitation was temporarily suspended by mutual agreement between the parties. If the respondent had at the first deserted his wife, but, repenting, had returned to her, and honestly entered into such an agreement, I do not think that while it lasted his desertion could be held to have continued. If, during this temporary suspension of co-habitation, mutually agreed upon, the respondent had been guilty of unequivocal acts, demonstrating that he had taken advantage of it to break off his connubial relations, and had in fact abandoned his wife, desertion should in my opinion be deemed to have commenced from the time of the commission of those acts. But no such acts have been brought to light here; and moreover, a desertion commenced in May 1889, even if conclusively proved, would have been too late to warrant the petitioner's prayer. (See *Fitzgerald v. Fitzgerald*,

L.R. 1 P. & D. 694; *MacKenzie v. MacKenzie*, 3 V.R. (L.) 248; *Trenegrove v. Trenegrove*, 5 V.L.R. (L.) 27.) This petition will be dismissed.

Proctor for the petitioner, *Sundilands*.

DOMEC CARRE V. DOMEC CARRE.

March 21st.

Costs of petitioner suing in forma pauperis.

In a suit for the dissolution of marriage by wife against husband the petitioner if successful though she sue in forma pauperis is entitled to costs out of pocket.

This was an undefended suit for the dissolution of marriage by the wife against the husband on the ground of his adultery on divers occasions with one Minnie Hickey.

Mr. Neighbour for the petitioner proved the charges alleged and His Honour granted a decree nisi. Counsel then asked that the petitioner who was suing in *forma pauperis* should be allowed her costs out of pocket, and referred the court to *Carson v. Pickersgill and Sons*, 14 Q.B.D. 859, in support of his contention.

MR. JUSTICE HOLROYD.—I shall on the authority of that case make an order that the respondent pay the petitioner's costs out of pocket, such costs to be taxed.

Proctors, *Smart and Walker*.

SUPREME COURT OF TASMANIA.

FOURTH TERM.

(In Equity)

OMANT AND ANOTHER V. STEPHEN AND MINISTER OF LANDS.

Novr. 1891.

The Court has no power to restrain the Minister of Lands from issuing leases of mineral sections—There is no original jurisdiction in the Supreme Court to hear objections to applications for leases, but application should be made to Commissioner—"The Mining Appeals Regulation Act" (46 Vic. No. 20) gives right of appeal from his decision.

Crisp and Omant for plaintiffs.

Attorney-General and Mugliston for defendants.

The facts are set out in the judgment.

THE CHIEF JUSTICE:—The plaintiff's bill states that they on the 13th November 1890, marked off a selection of 80 acres of mineral land, and on the 4th December following applied to the Minister of Lands for a lease of it, under the *Mineral Lands Act* 1884. That on the 19th November, 1891, one Cundy applied to the Minister for leases of two sections of 80 acres each, stating that they were duly marked off on the 10th November, but the plaintiffs allege that they were not marked off for some considerable time afterwards. On the 7th May,

1891, the surveyor's report upon the last two mentioned sections was received by the Secretary of Mines. On the 20th of that month the plaintiffs wrote to that officer requesting him not to proceed to issue leases for these two sections until the section marked by the plaintiffs had been surveyed. On the 11th September following the surveyor reported that the land surveyed under the plaintiff's application embraced part of that included in the two sections surveyed to the defendant Stephen, to whom Cundy's interest had been transferred. The bill then stated that the Minister of Lands would issue leases to Stephen of the two sections surveyed to him unless the Minister was restrained by injunction. Upon this an *ex parte* injunction was applied for in Chambers, on the ground that the plaintiffs' marking off was anterior in point of time to the marking off of the two sections applied for by Stephen, and an injunction was granted restraining the Minister from issuing the leases. A motion was then made to the Full Court on the part of the defendant Stephen to dissolve the injunction, on the ground that his two sections were marked off on the 10th November, and in the evidence presented to the Court it was satisfied that the two sections were marked off on that day, and therefore before the plaintiffs' was marked off, and dissolved the injunction. The Court on the hearing of the motion threw out a suggestion as to whether it had jurisdiction to entertain the bill, but the necessity for considering the question did not arise as the injunction was dissolved. Thereupon the leases of the two sections were delivered to Stephen. The plaintiffs having obtained further evidence tending to show that the two sections were not marked off on 10th November, proceeded to amend their bill, setting out that the leases had been obtained by the false statement that the two sections were marked off on 10th November, and praying (1) that the defendant Stephen might be restrained from transferring his interest so far as it included any of the land applied for by the plaintiffs; (2) that the Minister of Lands might be restrained from registering any such transfer; (3) that the leases might be declared void as against the plaintiffs; and (4) that the plaintiffs might be declared to be entitled to a lease of the 80 acres applied for by them, and that the Minister might be ordered to issue such lease to the plaintiffs. Having thus amended their bill the plaintiffs moved the Court to vary its order dissolving the injunction; (1) by reversing the order to pay the costs of the dissolved injunction, and for an enquiry as to damages; (2) by granting an injunction to restrain the defendant Stephen from transferring his interest under the leases; and (3) by restraining the Minister from registering any such transfer. It may be at once said that had the fresh evidence been before the Court it might have refrained from dissolving the injunction, as it did, upon the facts, but it now becomes necessary to consider what the powers of the Court are under such circumstances as those set forth in the bill. Unfortunately, upon this all important question the case was not fully argued. It was open to the plaintiff on the 20th November, instead of writing to the

Secretary of Mines requesting him to postpone the issue of the leases to Stephen, to have put in a formal objection to his application, if they believed that the land surveyed to him included part of land previously marked off by them. The Act empowers the Commissioner to hear and determine in a summary manner such objection (section 54), and there is an appeal given from his decision (46 Vic., No. 20) to this Court, but there is no original jurisdiction conferred upon this Court by the Act to hear objections to applications for leases. The bill in its original form was virtually an application to this Court to hear an objection to a lease, after the time allowed for making it before the Commissioner had expired, for the objection must be made according to the regulations within 14 days after the surveyor's report had been received, and the bill was not filed till three months after its receipt. The amended bill raises the same question but in an altered form. Parliament, by conferring upon the Commissioner power to hear objections to application for leases, would not deprive this Court of the power to do so, if and so far as it already possessed jurisdiction over such subject matter. The Court has jurisdiction to enforce contracts and restrain trespasses with respect to law. In this case there was clearly no contract between the plaintiffs and the defendant Stephen; but if there was a valid contract enforceable by this Court between the plaintiffs and the Crown as to part of the land leased to the defendant Stephen, and he took with notice of this prior existing contract, then the Court might decree the defendant Stephen to be a trustee of such part to the plaintiffs. But the applicant for a lease takes no interest at law or in equity against the Crown, until he gets his lease. If he marks off the land and complies in every respect with the regulations he has no contract with the Crown, which this Court can enforce, for by section 20, which provides for the granting of leases, it is enacted that "it shall be lawful for the Minister, with the consent of the Governor-in-Council to grant to any person a lease," etc. In Victoria the *Mines Act* 1890 sect. 49, runs "it shall be lawful for the Governor to grant to any person" leases, etc. The Supreme Court of Victoria has held that the words "it shall be lawful" confer upon the Governor a discretion as to granting leases (*Perkins v. Hercules Co.*, 5 W.W. & A.B.M., 48), and there seems no reason for doubting the soundness of the decision. In the Tasmanian Act the words "It shall be lawful for the Minister," not only give him a discretion, but the Act superadds a further discretion as necessary to the issue of a lease, namely, the consent of the Governor-in-Council. The discretion conferred upon both the Minister and the Governor-in-Council is created by Statute, presumably for the protection of the public, and its exercise therefore could not be controlled by this Court, and it exists until the lease is granted. The intervention of the Court is sought to compel the Minister of Lands to issue a lease to the plaintiffs, and the injunctions sought are subsidiary to this relief; but where the ultimate relief sought is beyond the jurisdiction of the Court, the subsidiary injunctions, if granted, would be

futile, and the Court would not, if it could, grant them. With reference to trespasses, as the plaintiffs take no interest in the land, they can have no claim against trespassers upon it. In Victoria, the *Mining Act*, section 65, expressly confers upon those who have marked off land for a lease the right to proceed against trespassers, but the Tasmanian Act confers no such powers. The leases were granted to defendant Stephen in this case upon an application regular on its face, and no objection to it was made in accordance with the regulations. If there was a fraud in the application the Crown can proceed in this Court to have the lease set aside (*Reg. v. Hughes*, L.R. 1, P.C. 81), but the plaintiffs, even if they are 'right upon the facts, have no interest in the land, and never had any, and have no *locus standi* to come to this Court to have the leases set aside for fraud. If it is true that the plaintiffs first marked off the land the Crown would probably have leased the land in dispute to them, but this Court would have had no power to compel the Crown to do so, even if the leases to the defendant Stephen were set aside or had never been granted. The bill must therefore be dismissed.

BRISEIS T. M. CO. v. BROTHERS HOME T. M. CO.

Decr. 1891.

Mines—Natural lateral support—Blocking-out.

Application for injunction to restrain defendants from trespassing upon plaintiffs' land, and for permitting the land on the plaintiffs' section to remain insufficiently supported.

Attorney-General and R. Byron Miller for plaintiffs.

G. Collins and W. H. Bryant for defendants.

The facts appear from the judgment of the Court.

THE CHIEF JUSTICE;—This is a suit brought by the plaintiffs, the Briseis Co., to restrain the defendants, the New Brothers Home No. 1 Co., from trespassing upon certain lands of the plaintiffs, and from permitting it to remain insufficiently supported, and from interfering in any way with the soil or tin-bearing drift upon the said land. The plaintiffs hold, as lessees from the Crown, certain land for the purpose of mining for tin. The defendants hold adjoining land for the same purpose, and also as Crown lessees. The tin is found in a deposit of drift about 200ft. in thickness. The drift is described by Mr. Montgomery, Inspector of Mines for the colony, as a very small gravel in size between grains of rice and peas; that it runs loosely, almost like dry sand. The angle of repose is stated to be from 1 to 1 to 2 to 1. This tin-bearing drift is about 200ft. deep, and overlying it is a cap of basalt of about 100ft. thick. Underneath the drift is a bed of granite. Such a formation is said to be unique, so that little aid can be obtained from experience in working other mines. The plaintiffs have worked their mine in the following manner:—They have removed the basalt from the surface of part of their land, some chains from the defendants' boundary, and where this is done they have sunk a shaft, known as their "dump shaft," from the surface to within a few feet of the bottom of the drift. From

the bottom of this shaft they have, at a cost of £15,000, carried a tunnel, known as "the main tail-race drive," which comes out to the surface on the side of the hill upon which the mines are situate. The drift is washed from this surface by "sluicing," i.e., by water applied through hose and nozzle. It passes down the dump shaft, and is received in trucks at the bottom of the shaft, and is carried along the tail race out of the mine. The plaintiffs also carried a drive along the boundary, and an intermediate drive, known as "the main south drive," between that and the tail-race, and made some crosscut drives between them. The race and drives were timbered throughout. The plaintiffs have never worked their mine by "blocking out." The defendants commenced working their mine in April, 1890. Their predecessors, from whom they had shortly before acquired the mine, worked it by the system known as "blocking out," that is by making longitudinal drives, with crosscut drives between them, and then taking out the drift between these. The drives were all timbered, and in getting out the drift timbering was also used, but the bottom fell in almost as soon as the miners left it. A body of drift was thus taken out by the predecessor company of 700ft along and up to the boundary, it was 45ft. in depth, and varied in breadth from 300ft. to 45ft. It was taken out in three sets of blocking out drives. The defendants have since they commenced work in April 1890, put in a drive along the boundary and two others parallel to it, with crosscuts between them. These are well timbered drives, and are about 7ft. to 8ft. high, as are also the drives in the plaintiffs' mine. The plaintiffs complain, first, that the defendants in making their boundary drive encroached upon the plaintiffs' mine. The evidence showed that the defendants encroached at most 2ft. to 3ft. for a distance of about 100ft., that they did so accidentally, and withdrew at once upon their attention being called to it and offered to compensate for any damage. No damage was proved at the hearing, and the few yards of drift thus removed are too insignificant in value to call for the interference of the Court. The plaintiffs next claim damages for injury caused to their mine by the workings of the defendants. The evidence shows that in the plaintiffs' tail-race the timbering was sound on the 28th November 1890, that on the next day 14 sets of timbering, and on the following day five sets of timbering, were so damaged by vertical and lateral pressure from the surrounding drift that they had to be replaced, and that the damage showed a drag of the plaintiffs' tail-race towards the defendants' mine opposite the defendants' workings. This damage was attributed to the defendants, and the plaintiffs, on 21st December, 1890, obtained an *ex parte* injunction to restrain the defendants from continuing their works near the boundary. The plaintiffs' tail-race continued to suffer damage from vertical and lateral pressure with a westerly drag till about the end of January, when it ceased. The plaintiffs contended that the defendants, in putting in their drives, had disturbed the old and extensive workings of their predecessors, which were some 30ft. or 40ft. above their new drives,

and that by joint action of old and new workings the damage, if any, was caused. The plaintiffs' boundary drive had been crushed in before the defendants commenced to work, and the main south drive was said to have been subjected to great pressure and injury in November and December 1890. The tail-race drive was about 66ft. from the boundary and about 8ft. higher than defendants' drives. Before the defendants put in their drives the cap of basalt had cracked through, a little way within plaintiffs' boundary, and several fissures from 2ft. to 4ft. broad had opened on the surface of the plaintiffs' land near the boundary, and opposite the old and new workings of the defendants' mine. The movement was shown to be towards the defendants' mine, as the boundary peg near the fissure was proved by survey to have moved some 4ft. or 5ft. westerly on the defendants' ground. Mr. Montgomery inspected the fracture in the basalt, and also the fissures, in June, and again in December, 1890, and stated that the appearance of the surface remained unchanged during that period. He was of opinion that the damage was caused by the old, and not by the new workings of the defendants' mine. The drives made by the defendants showed no distinct drag, nor any undue pressure, and were sound and in good condition. The burden of proving that the damage to the plaintiffs' tail-race was caused by the defendants lay on the plaintiffs. As the new drives of the defendants had, as compared with the tail-race drive of the plaintiffs, suffered no injury, it seems improbable that any run or fall of drift caused by the construction of the defendants' drives would have injuriously affected the plaintiffs' tail-race, which was 60ft. distant, whilst they themselves remained unaffected. Moreover, the old timbering in the old blocking out might give way from the decay of timber, or settlement or flow of water into the fissures, and so affect the plaintiffs' mine. The Court came to the conclusion that it could not on the facts find affirmatively that the defendants had damaged the plaintiffs' tail-race by their workings. This rendered it unnecessary to consider the question as to how far the plaintiffs' tail-race was entitled to support from defendants' land. The plaintiffs' third contention was that the defendants were about to proceed to take drift up to the boundary by the process of "blocking out," and that this would cause irreparable injury to the plaintiffs' mine. The defendants replied that there was no proof that they intended to proceed by blocking out, but the fact of their putting in their drives in the mode adopted by them, together with the evidence of the experts, satisfied the Court that the drives could have been put in for no other purpose. The effect of the system of blocking out up to the boundary is thus stated by James Harrison, an Inspector of Mines for the Government: "If the defendants blocked out at the lower level to the boundary it would destroy the plaintiffs' south drive and tail-race." "The ground was on the work," as miners call it. Mr. Aiton, manager of the Briseis, says that "The levels collapse as the area is blocked out. They all come down. The overhead floors collapsing into the new block only

causes a large cavity from overhead, and drift from the sides runs in." Mr. Montgomery says that if defendants blocked out from their drives the drift would run in from the Briseis. Mr. Webb, manager of the Ormuz, says:—"The drives are put in for blocking out. If blocking out is proceeded with from those drives it will cause the ground to collapse, and the adjoining ground will move towards the broken part, including the Briseis mine; it would injure the main tail-race of the plaintiffs." He adds that if blocking out took place from those drives it would prove disastrous. Mr. Reginald Murray, Government Geologist of Victoria, a witness called for the defendants, says that "neither mine could block out up to the other's boundary without causing a run of drift from the neighboring mine; even if the drives were blocked with timber there would be some shrinkage." There is further evidence for this aspect of the case, and also evidence on the other side, but the conclusion the Court arrives at is that proceeding by "blocking out," in proximity to the boundary, must necessarily cause substantial injury to the plaintiffs by depriving their mine of the natural lateral support to which it is entitled, and by causing the tin drift of the plaintiffs' to run into the defendants' mine. It was suggested that damage might be averted by filling the drives when used with timber, as the plaintiffs had blocked up some of their abandoned drives in this manner. This plan might answer on a small scale to secure the stability of single drives, but when it came to filling in large blocked out areas, its practicability would depend upon its cost, as compared with the value of the tin drift removed. It appeared to be suggested as what was possible, rather than as what was practicable. The Court has not gone more fully into the law on the evidence, because both were fully considered by it as lately as last May, when a motion to dissolve an *ex parte* injunction was refused. The claim then set up by the defendants was to a right to mine up to their boundary, and they asserted their intention to block out up to it, but they contended that the law as to natural lateral support as laid down in *Angus and Dalton* (8 App. Ca. 791), applied only to the support of the surface, and not to the lateral support of soil beneath the surface. We are of opinion that the case comes within the principles laid down in *Fletcher and Bealey* 28 Ch. Div. 689, and that the plaintiffs are entitled to a perpetual injunction, restraining the defendants from working their mine by the process of blocking out so near to the boundary of the plaintiffs' mine, as to cause any of the drift to run in from the plaintiffs' mine into the mine of the defendants; and from depriving the mine of the plaintiffs of its natural lateral support.

Costs follow the event.

IN CHAMBERS.

Before Holroyd J.

MOORE v. RUSSELL.

22nd March.

Rules of Supreme Court 1884. Order III. r. 6.—Order

XIV. r. 1.—Specially endorsed writ—Final judgment—Amendment—To entitle a plaintiff to apply for final judgment under order XIV. r. 1. the writ must be specially endorsed at the time the defendant enters his appearance—After appearance an amendment of the writ will not be allowed for the purpose of enabling the plaintiff to apply for final judgment under order XIV. r. 1.

Application on behalf of the plaintiff for leave to sign final judgment under order XIV. r. 1.

The writ was endorsed as follows:

STATEMENT OF CLAIM.

The plaintiff's claim is for £425 3s 2d for moneys paid for and on behalf of the defendant and interest thereon being amount of defendant's proportionate share under and by virtue of two several guarantees dated respectively the 8th August 1889, and the 4th February 1890, given by the plaintiff and the defendant together with others to the English Scottish and Australian Chartered Bank.

PARTICULARS.

1891.	
27th Oct.	To defendants proportionate share of amount paid by plaintiff to Messrs. Moule and Seddon, as solicitors for the English Scottish and Australian Chartered Bank on joint and several guarantees dated the 8th August 1889 and 4th February 1890.
	416 16 10
	Interest thereon at 8% to 29th Feby. 1891.
	8 6 4
	£425 3 2

The plaintiff also claims interest on the said sum of £425 3s. 2d. at the rate of 8% per annum from the 29th February 1891 until payment or judgment.

Mr. Hayes to oppose.—There is the preliminary objection to this application. The writ is endorsed with a claim for interest and it does not appear that the claim for interest arises out of any agreement to pay interest; the writ is therefore not a specially endorsed one *Coane v. Thomas Bent Land Co.* 12 A.L.J. 182; 17 V.L.R. 198. If the plaintiff be successful he can be awarded interest in the nature of damages under sec. 224 of the *Supreme Court Act* 1890.

Mr. Skinner in support.—I apply for leave to amend the writ by striking out the claim for interest under order XXVIII r. 1.

Mr. Hayes in reply.—It was held in *Gurney v. Small*, 1891, 2 Q.B. 584; that in order to enable the plaintiff to apply for final judgment the writ must be specially endorsed at the time the appearance was entered and that if the writ was not then so endorsed the plaintiff cannot by any subsequent amendment convert the writ into a specially endorsed one for the purpose of applying for final judgment. Your Honor ought not to allow the amendment for this purpose.

His Honor said.—I quite agree with Mr. Hayes' contention that I cannot now order the writ to be amended for the purpose of enabling the plaintiff to apply for final judgment under order XIV. r. 1. This rule provides that "where the defendant appears to a writ of summons specially endorsed" the plaintiff may apply for final judgment. In the present case the writ was not a specially endorsed one at the time when the defendant entered his appearance and therefore the plaintiff cannot apply under order XIV. r. 1. In

the case of *Punstall Brick and Pottery Co. v. Mercantile Bank of Australia Limited*, ante pg. 178. I hold that a writ with a manifest blunder in it but being otherwise specially endorsed did not lose its character by reason of the blunder; but the writ in the present case has never been specially endorsed. I therefore dismiss the application without costs. I certify for counsel.

Solicitors for plaintiff *F. S. Stephen Junr*; for defendant *Waxman*.

But see *Blair v. Lane*, 8 A.L.T. 90 [Ed].

SITTINGS IN BANCO.

(Before Williams, a'Beckett & Hodges, J.J.)

McMECHAN V. AIRKEN & ANOTHER.

Feb. 5, 8, 9, & 10.

Motion for new trial. Right of Court to consult the judge who tried the action. Testamentary incapacity. Questions for the jury.

On a motion for a new trial on the ground that the verdict of the jury is against evidence and the weight of evidence the court has a right to consult the learned judge who tried the action as to whether he was satisfied with the findings of the jury.

On such a motion the question that the court has to consider is not whether the learned judge who presided at the trial was satisfied with the findings of the jury though serious consideration should be given to his opinion; nor is it for the individual members of the court to consider whether they themselves would have come to a different conclusion, but it is for the court to consider whether the verdict was one such as a jury of reasonable men ought not to or could not, upon the evidence adduced at the trial, have arrived at.

In an action to set aside a will on the ground of testamentary incapacity the questions that the jury have to consider are whether at the time the testator made the will in dispute his mind had a sufficient grasp of the nature and extent of his devisable property, of those who might be considered to have claims upon him and of the nature of those claims.

This was a motion for a new trial on the ground that the verdict of the jury was against evidence and the weight of evidence. The action was by a next-of-kin of a deceased person, to obtain revocation of probate of a will executed by the deceased on the 1st June 1888, to have such will declared invalid, and to revive a previous will and the codicils thereto which the deceased had purported to cancel at the time he executed the will of June, 1888. On the ground of undue influence alleged to have been exercised by another next-of-kin, and on the ground that the testator was not of sound mind, and of testamentary capacity at the time the said will was executed. The defendants in the action were the executors under the will to whom probate had been granted. The action was tried before a jury of twelve, and they found that

there had been no undue influence in procuring the execution of the will of June, 1888, but the other issues they found in favor of the plaintiff on such findings. Judgment was entered up for the plaintiff. The defendants then moved for a new trial on the grounds above stated.

Mr. J. D. Wood, Dr. Madden, Mr. Johnson and Mr. Coldham, appeared in support of the motion.

Mr. Purvis, Q.C., and Mr. Topp, appeared to oppose the motion.

Cur. ad. vult.

March 8th.

MR. JUSTICE WILLIAMS.—In this action the jury found in favour of the plaintiff upon the issues (1) that the testator was not of sound mind and capable of executing a testamentary document prior to and at the time of executing the will dated the 1st day of June, 1888, and (2) that he was not of sound mind and testamentary capacity when he cancelled the will of 24th of February, 1870, and the codicils thereto dated respectively 25th October, 1875, and 19th of February 1877. Upon these findings the learned Chief Justice, before whom the action was tried, ordered judgment to be entered for the plaintiff, and the defendants now apply to us to order these findings to be set aside and to grant a new trial upon the grounds that these findings are against evidence and the weight of evidence. At the outset it is right that I should state that we have in considering this application for a new trial on the ground of the findings being against evidence, asked the learned Chief Justice whether he is satisfied with the findings. He has informed us that he is not satisfied with the findings of the jury, and that in his opinion they are wrong findings. As our right to thus communicate with the Chief Justice was questioned during the argument I may state that the case of *Webster v. Friedeberg* (17 Q.B.D., p. 736) is a distinct authority for the step we have taken. There is, no doubt, abundant evidence in the present case which would have justified a jury in coming to a contrary conclusion, namely, to a conclusion in favor of the defendants, but that is not the proposition which we have to consider upon the present application. The proposition we have to consider is this—Have the appellants satisfied us that a jury of reasonable men ought not to or could not upon the evidence adduced at the trial arrive at the conclusions come to by the jury in the present case (*Webster v. Friedeberg*, (already cited)? In considering this proposition, though we are not bound by the opinion of the learned Chief Justice, yet we are bound to take it into our serious consideration (*Webster v. Friedeberg*), and were it not for that opinion we should have felt less hesitation in coming to the conclusion at which we have arrived upon the present application. Keeping this opinion in mind, is there evidence in this case of such a nature that a jury of reasonable men could not or ought not to arrive at a conclusion in favor of the plaintiff upon the issues submitted? To enable us to answer this question a careful review of the whole evidence becomes absolutely necessary. The evidence may be divided into three classes—(1) the medical evidence; (2) that of

relations, friends, and acquaintances of the testator, (3) the evidence of the testator's legal adviser, and the evidence of the wills of 1870 and 1888 and of the facts and circumstances connected with their execution. It appears that up to the 9th of March 1888, the testator, for so old a man, was both mentally and physically active and vigorous. Upon that date he undoubtedly had a seizure of a serious kind while lunching at his club, and after the date of that seizure the weight of evidence shows that he became in a marked degree less vigorous and active in both mind and body. These are facts upon which not only is there sufficient evidence to go to a jury, but which the weight of the evidence clearly establishes. Now, applying the medical evidence adduced for the plaintiff to these facts, it is to the effect that the seizure at the club on the 9th of March must have been of a cerebral nature, and that within a very short period thereafter he was undoubtedly suffering from disease of the brain—softening of the brain, or an embolism in the brain—and that this disease was of a progressive nature. It is true that there is much medical and other evidence to the contrary, evidence to show that the attack on the 9th of March was of a cardiac character, and that the subsequent symptoms were also of the same nature, and that what the testator was suffering from on that date and thereafter was disease or fatty degeneration of the heart; and had the case rested upon the medical evidence adduced for the plaintiff we should have had no hesitation in setting aside the findings of the jury. But there is evidence in the case to support the medical opinion that the testator was, on and after the 9th of March and up to the date of his death suffering from some disease of the brain. Part of the evidence to which we refer is that of numerous witnesses, relatives, friends and acquaintances of the testator, who testify to the following facts:—That from the date of the seizure on the 9th of March a very marked mental and physical change for the worse took place in the testator, according to many of those witnesses a change progressive from bad to worse; that after that date his speech became indistinct, thick, and almost unintelligible, his memory greatly impaired, his power of vision reduced and confused, his gait shuffling and feeble; that he became more hard of hearing, unable to read or to write (except his signature to cheques), or to keep his accounts; that whereas he had been before the 9th of March in the constant habit of going into town two or three times a week to attend to business, he only did so upon one occasion after that date; that he had to be watched; that he could not be trusted with documents or even to get the postal delivery as had been his custom. I do not say that all the witnesses to whom we have referred speak to each one of these facts, but some depose to one fact and some to another; some of these facts are deposed to by the principal witness for the defendants, Grace Mackie—as, for instance, the testator's inability to write, to keep his accounts, to visit town, the necessity for having him watched, the reluctance to trust him with the care of documents or letters. The period of time covered by these witnesses is that from the date of the seizure on

the 9th of March up to the 16th of May, 1888, and again that from the 1st of June, 1888, up to a date shortly before the testator's death. It is true that to a very great extent, if not entirely, the period from the 16th of May, 1888, to the 1st of June of the same year is not covered by the evidence relied upon for the plaintiff; but it is a legitimate inference to draw that the testator was in no better condition, either physically or mentally, between those dates than he was in before the one and after the other. Now, it may be contended with some force that this evidence more or less tends to support the medical opinion that the testator was afflicted with disease or softening of the brain, and that this disease was progressive; but with still greater force may it be contended that, if this evidence is to be believed, it may reasonably lead to the inference that at any rate from and after the 9th of March, a break-up of the testator's mind and body set in, and that from and after that date he was suffering from progressive senile decay—greatly impairing mental faculty and physical power—rendering his mind dull, torpid, and sluggish, his memory defective and unreliable, his speech unintelligible, producing inability to read or to write, rendering him incompetent to transact any matter of business of importance, reducing him from his former condition of mental and physical activity and vigour to a comparatively helpless and childish condition. May not a jury then, upon the evidence to which we have thus far referred, reasonably arrive at the conclusion that, when the testator gave the instructions to his solicitor for his will on the 16th of May, 1888, and thence up to and including the 1st day of June, 1888, he was suffering from progressive and advance senile decay, that from its effects his mental faculties were at these dates greatly enfeebled and deadened, and that his memory, though not altogether gone, was most faulty, unreliable, and treacherous? If so, then this conclusion may reasonably form a material element in guiding them to their conclusion upon the main question, viz., as to whether, prior to and at the time of executing the will of the 1st of June, 1888, and of destroying the will of the 24th of February, 1870, and the codicils thereto attached, his mind had a sufficient grasp of the nature and extent of his devisable property, of those who might be considered to have claims upon him, and of the nature of those claims. If that inference be not unreasonable in the inference as to the state of the testator's mental faculties at the dates specified, it may reasonably guide the jury to their further conclusion that, when the testator was called upon to give instructions for and to execute a will and to destroy a previous will, it would, at any rate, be necessary to take special pains, and make special and careful effort, to rouse his mind and memory to a proper and sufficient appreciation of those circumstances which we have just mentioned, and that without these precautions and safeguards being taken he would not possess the requisite mental testamentary capacity. This brings us to a consideration of the third class of evidence, that of the wills of 1870 and 1888, of the facts and circumstances connected with their execution,

and that of the testator's legal adviser, Mr. Klingender. The more this class of evidence is considered the more important it becomes as supporting the theory of senile decay and its detrimental effects upon the mental powers of the testator, and as strengthening the contention for the plaintiff that, when the testator gave instructions for the will of 1888, and when he executed it, his mind and memory were not in a condition to entitle him to be considered as possessing sufficient testamentary capacity. In 1870 the testator's devisable property did not amount to £20,000. He was then admittedly a man of powerful and active mind. In that year he made a will (exhibit F), by which he distributed the whole of this property amongst the persons named in that will. He was clearly of opinion that after satisfying these bequests there would be no residue, but in the event of there being a residue, he instructed his solicitor to insert in the will that the residue was to be divided amongst the relatives. In other respects the will of 1870 was drawn up in accordance with the instructions of the testator, but as to the residue, which the testator believed to be *nil*, by the will it was divided amongst the legatees, not amongst the relatives. Under the will of 1870 the Mackies, five in number, got £4,400 amongst them, the present plaintiff £1,000. Between 1870 and 1888 the testator's property and its value increased enormously; in 1888 it value was something under £130,000. Had the will of 1870 stood, after satisfaction of the legacies, the very large residue would have been divided amongst the legatees under that will. Now, was the testator in 1888 sufficiently alive to the altered condition of his estate; to the effect that the altered condition would have upon the beneficiaries under the will of 1870; to the fact that in 1888 that residue, which in 1870 was *nil*, was the substantial bulk of his property, and that the specific legacies were an insignificant part? We think there is evidence that he was not. He apparently never thought of altering the disposition of his property, or of any necessity for any alteration. He seems to have been perfectly satisfied that his property should go as he had intended it should go years before. He had no spontaneous desire to give one more or another less than he had given before, and but for the suggestion of a friend we may reasonably suppose that no new will would have been made. He had to be stirred up, so to speak, into sending for his legal adviser. This is shown by the following passage of the evidence of Mr. Aitken:—"Well, you have got over that attack; perhaps you won't get over another so easily. Have you settled your affairs?" The testator.—"Oh, I have got a will." Aitken.—"But things are changed very much since 1870 with you. You had better let me send Mr. Klingender out to you, and have it overhauled." In consequence of this conversation the testator asked Aitken to send Mr. Klingender, his solicitor, out to him. Aitken does this on the 14th of May, and on the same day Klingender goes out to see the testator, taking with him the instructions for the will of 1870. Turning now to the solicitor's evidence, he states:—

"I said, 'Mr. Aitken tells me you want to see me professionally.' He replied that he wanted to see me about his will; that a great number of the people named in his former will had died, and that things had changed very much since the old will was made. I then produced the paper (exhibit No. 4), and said, 'Now, Captain, I'll read over the names of the people mentioned in the old will, and you will tell me which of them are dead.'" Klingender then states that he read through the names, and took directions of various kinds from the testator as to leaving one name in and striking another out, and his evidence then proceeds as follows:—"Having got that information I said, 'Now what is your will to be?' He said 'The same as the old will, and I'll have a legacy to the Ladies' Benevolent Society.' I said 'What amount?' He said, £500.' I said 'What is to become of the residue?' He said, 'That is to be divided amongst the Mackie family.'" Now, it is to be observed that throughout this interview and conversation, though the testator's property is at that time of the value of about £130,000, he makes no change nor suggests any change in the specific legacies to the various legatees mentioned in the will of 1870—those legacies virtually absorbed the whole of the testator's property in 1870; in 1888 they represented a very insignificant portion of it—and when he is asked the important question, "Now what is your will to be?" his answer is, "The same as the old will, and I'll add a legacy to the Ladies' Benevolent Society;" that is the only alteration he desires to be made so far as regards the legacies specified in the old will, beyond striking out some of them, and though he strikes out some of them, it does not occur to him to alter the amounts bequeathed to the others. Then he is asked, "What is to become of the residue?" and his answer is, "Divide that amongst the Mackie family." Now the effect of these few words, in which he did not trouble himself to say anything as to the proportions, conditions, or method of division, was to create an entirely new disposition of the bulk of his property, and the conclusion that it was his desire to make this great change is only to be drawn from his having given this short answer to a question asked. Under the old will the various legatees, including the plaintiff, took amongst them substantially the whole of the testator's property as it then existed, and they shared the residue, which as early as 1878 had become considerable. Under the new will of 1888, which the testator desired should be the same as the old, with the exception of adding a legacy to a benevolent society, the various specific legatees take, comparatively speaking only a trifle, and substantially the whole of the property goes to the Mackies; and yet in the interview to which Mr. Klingender deposes, the testator, when the Mackies' names and their specific legacies were read out, never suggested that he intended to give to them much more than before, or that as the residue was to go to them they should be struck out from the list of persons whose legacies would diminish the residue. In fact their specific legacies were struck out by the solicitor apparently without authority, and

the testator made no comment on this when his will was read out to him. This alteration from his instructions was not purely formal, for it put Anthony Mackie on an equality with his sisters instead of giving him £200 less as a specific legatee. Now, from this and the other evidence to which I have referred, may not a jury infer, and reasonably infer, that the testator at this time very imperfectly understood what he was doing; that he had a very imperfect notion of the change that had taken place in the value of his property, of the complete bouleversement these instructions, if carried out, would make of the disposition of his property, and of his intentions under the will of 1870; that he had no sufficient appreciation of the result of his off-hand instruction—"Divide the residue amongst the Mackies"? Is it not open to a jury to infer that he did not realise that this residue was at that time substantially the whole of his vast estate? It is also to be observed that throughout the interview of the 18th of May the testator appears to originate no proposal. His solicitor asks him certain questions, or does what is equivalent thereto, and to them the testator, it is stated, responded, and not a word about the enormous residue appears to have escaped him till, at the very close of the interview, Mr. Klingender asks "What about the residue?" The next fact is that on June 1 Klingender attends the testator with the engrossment of the new will, he reads the operative portions of the will aloud, and apparently the testator makes no remark, but signs the will as engrossed. We think that there exists in this case substantial evidence from which a jury may reasonably infer that when giving instructions for and when executing this will of 1888, the testator had no adequate notion of his property—of the effect of his intended or actual disposition of it—of the complete change that he was making in the dispositions under the will of 1870—of the value of his residuary estate, and consequently of the enormous disproportion between the benefit conferred upon the Mackie family and those conferred upon the other legatees under the will. This view is quite consistent with the jury's belief of Mr. Klingender's evidence. In one aspect the strongest evidence against the will is afforded by the narrative of the circumstances under which the instructions came to be given, and the manner in which they were given and acted upon. When the person apparently so indifferent as to the disposition of his large property is shown by all the evidence to have been suffering from bodily infirmity, and, according to much of the evidence, from mental infirmity, it is going further than we feel at liberty to go to declare that the jury were bound as reasonable men to support the will upon evidence of the testator's apparent intelligent understanding of other matters of business, and of his capacity for ordinary conversation on the small personal topics which came under his notice. The value of this evidence in favour of the will must greatly depend upon the character of the witnesses who gave it, upon their powers of observation, upon their tendency to exaggerate or to speak accurately

upon points which the jury were in a better position to form a judgment than we can possibly be. We have not to determine that we should ourselves have come to the same conclusion as the majority of the jury, but before upsetting their verdict we should be sure that as reasonable men they ought not to have arrived at it. Looking at the strong evidence for and against the will, and the points of contradiction between witnesses who are in conflict, we cannot say that the jury were bound to find in favour of testamentary capacity. We dismiss the motion with costs.

Solicitors for the defendant appellants, *Messrs. Klingender and Co.*

Solicitor for the plaintiff respondent, *Herald.*

(Before Higinbotham, C.J., Williams & Hood, J.J.)

SHEPHERD V. PENGLASE.

March 3rd & 4th.

Resulting trust—Married Women's Property Act 1890, s. 4 subsec. 2. Action against a married woman. Obligatory judgment against. Form of.

Where a purchase is made in the name of a wife or other near relative the presumption that a provision was intended is only a circumstance of evidence, and evidence is admissible to rebut such presumption and to prove what was the intention of the purchaser at the time the purchase money was paid.

In actions on contracts against a married woman it is only where damages or costs are recovered that the plaintiff must prove that the married woman had separate property at the time the contract was made.

The form of judgment against a married woman under section 4 subsec. 2 (approved of in Scott v. Morley 20 Q.B.D. at p. 132) may be as follows: "It is adjudged that the plaintiff do recover £— and costs (to be taxed) against the defendant (the married woman) such sum and costs to be payable out of the separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of section 22 of the Married Women's Property Act 1890 the property shall be liable to execution notwithstanding such restriction."

A married woman could have been sued for the enforcement of a trust before the Married Women's Property Act was passed and as the Act does not limit but extends the liability of married women a fortiori she can be sued for such a cause of action now.

This was an appeal from the decision of the late Mr. Justice Webb in an action by the plaintiff as assignee in insolvency of the estate of the defendant Walter Penglase to recover certain lands standing in the name of the other defendant Mary Penglase, wife of the first named defendant on the ground that such purchases were made with the moneys of the husband for his own benefit as the wife well knew and with her assent and that therefore she held the land as trustee

for her husband. Judgment was given for the husband with costs on the ground that he was not a necessary or proper party to the action. The defences set up by the wife were First, that the lands were bought with money which was her separate property and secondly answering that the purchase money or any part of it was the money of her husband he was at the time of the purchases able to pay all his debts without the aid of the said lands or purchase money and he paid such moneys for her advancement. After hearing the evidence the learned judge upon his finding of facts gave judgment for the plaintiff to the following effect.—Judgment for the plaintiff against the defendant Mary Penglase with costs. Declare the said Mary Penglase a trustee of the lands mentioned in the statement of claim for the plaintiff as assignee of the insolvent estate of the defendant Walter Penglase (husband of Mary Penglase). Order the said Mary Penglase to execute within 14 days proper transfers and conveyances of the said lands to the plaintiff as such assignee. Order the said Mary Penglase to deliver up to the plaintiff within 14 days all deeds and documents in her possession (if any) relating to the said lands costs to be taxed and when taxed execution therefor to be limited to the separate property of the said defendant Mary Penglase not subject to any restrictions against anticipation, unless by reason of section 22 of the *Married Women's Property Act* 1890 the property shall be liable to execution notwithstanding such restrictions. Against this decision the defendant appealed on the ground that the findings of the learned primary judge were against evidence and the weight of evidence, and on the ground that as no evidence had been given that the defendant Mary Penglase had separate property at the time the contract was made she could not be the subject of an obligatory judgment.

Dr. Smith and Dr. Madden for the defendant appellant.—The findings of the learned primary judge were against evidence and the weight of evidence. Assuming that the wife was a trustee of this land for the husband the transaction was an "acceptance of trust" and consequently a contract within section 3 of the *Married Women's Property Act* 1890 and as no evidence was given that the defendant had separate property at the time the contract was entered into she cannot be the subject of an obligatory judgment. *Palliser v. Gurney*, 19 Q.B.D., 519; *Stogdon v. Lee*, (1891) 1 Q.B. 661; *Surman v. Wharton* (1891) 1 Q.B. 491; *Chitty* 12th Ed. 232; *Critterill v. Curran* 11 A.L.T. 97; *Colonial Bank v. Kerr* 10 A.L.T. 201.

Mr. Goldsmith (with him *Mr. Coldham*) for the plaintiff respondent.—The learned judge has found against the defendants on the facts. The cases referred to do not apply as no damages were sought against the defendant and costs are limited to her separate estate.

Cur adv vult.
March 14.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the late Mr. Justice Webb, whereby it was declared that the defendant Mary Penglase was a trustee of the lands mentioned in the statement of

claim for the plaintiff as assignee of the insolvent estate of the defendant Walter Penglase (husband of Mary Penglase), and it was ordered that the first-named defendant should execute transfers and conveyances of the lands to the plaintiff as assignee. This judgment was founded on the findings of fact by the learned judge that the lands in question were purchased with money of the defendant Walter and conveyances taken in the name of defendant Mary by his direction or procurement, and that defendant Walter did not thereby intend an advancement or benefit to his wife. The lands were situated at Essendon and Richmond. They were purchased by the husband, Walter, at the end of the year 1886 and the beginning of 1887. He was then, although an uncertificated insolvent possessed of large means derived from successful mining at Broken Hill. He paid the purchase money, amounting to £970 12s., by cheques drawn on his own banking account, and he caused the transfers and conveyance to be made to his wife. In 1887, at the request, as he stated, of his wife, he built a house on the Essendon property at a cost of between £5,000 and £6,000, and he paid that sum out of his own moneys. In October, 1888, he obtained a release from his creditors under the first insolvency, their claims being paid in full. He became insolvent a second time on July 18, 1889, and the trustee of his estate, who is also his principal creditor, sues in this action to recover possession of the lands as property purchased with the moneys of the husband for his own benefit as his wife well knew, and with her consent, and as now held by her as trustee for her husband. Judgment was given for the defendant Walter Penglase, with costs, on the ground that he was not a necessary or proper party to the action. The defences set up by the wife, Mary Penglase, were—First, that the lands were bought with money which was her separate property; and, secondly, assuming that the purchase money or any part thereof was the money of her husband, that he was at the times of purchase able to pay all his debts without the aid of the said lands or purchase money, and that he paid these moneys for her advancement. The evidence of the facts of the case was that of the defendants, the husband and the wife. They are not entirely consistent with themselves or with one another in their narratives of the facts. The question which we have to determine on this appeal is whether the appellant has satisfied us convincingly and conclusively that the inferences of fact which the learned judge has drawn from the evidence are not only wrong but entirely erroneous. See as to this general principle of judgment in appeals on findings of fact in all the jurisdictions of the Court, *Allen v. Quebec Warehouse Co.*, 12 App. Cas. 101; *Gray v. Turnbull*, L.R., 2 Sch. App., 53; followed in *Koebeke v. Middlemiss*, 11 V.L.R., 472; *Re Woolf*, 1 V.L.R. (J. M. & P.) 21; *Re will of David Pigott*, 17 V.L.R. The husband, Walter Penglase, stated that he was at Broken Hill in 1884; that he was one of four lessees of land there, the interest in which was represented by scrip signed by him for 20 shares; that

in pursuance of a promise he had made to his wife, who had refused at first to accompany him to Broken Hill, he gave one scrip for one-twentieth interest in the land to her; that he gave another scrip of the same value to his son, and a third scrip to a servant, Miss Carson, to whom he paid from £950 to £1,000 in cash and by cheque, for which she gave a receipt. This receipt was not produced. A company was afterwards formed, in which the husband was entitled to 28,000 shares for himself, in addition to 4,000 shares each for his wife and son. All of these shares were issued to the husband in his own name. From the first to the last he treated them and the proceeds of them as his own. He stated that the gift to his wife and the gift to his son stood on the same footing and that they were both absolute gifts of one-twentieth share each. The father describes the gift to his son as having been paid by him in full by its investment in the purchase of property in Gippsland, but he admits that the title of the property may have been in his own name, and he undoubtedly mortgaged it, and he finally inserted it in his schedule as his own property. He stated that he paid his wife no money except by purchasing the properties in Essendon and Richmond. He paid the deposit and the balance of the purchase money of those properties out of his own banking accounts. The contract for the purchase of one of them was made in his own name. The consideration stated in the transfer to his wife, "in consideration of the natural love and affection held by him towards his wife," he now declares to be untrue. He continued to deal with those properties after purchase and registration in the name of his wife, in most respects as if they were his own. In addition to erecting buildings on one of them, he deposited the deeds in a bank and opened an account on which he received a large advance; and when the advance was paid off he redeposited them in another bank, and he opened another account in the joint names of himself and a creditor. This evidence, and the distinct admission of this witness that he had throughout treated the shares of his wife and son as if they were his own, warranted, in our opinion, the conclusion, either that the promise alleged to have been given by the husband to the wife was never given, or, if given, was never fulfilled, and that the lands in question were purchased with the money of the husband, and not with money which was, or was supposed by either of the parties to be, the separate property of the wife. In support of the second and alternative defence, reliance was placed upon the rule of law that where a purchase is made in the name, not of a stranger, but of a wife or other near relative, there is a presumption that a provision was intended, and that this presumption rebuts the resulting trust to the person who advances the purchase money. This presumption is only a circumstance of evidence, and evidence is admissible to rebut the presumption and to prove what was the intention of the purchaser at the time the purchase money was paid—*Devoy v. Devoy*, 3, Smale and Giffard, 403. In this case presumption was effectually displaced by the only case presented and sworn to by both the husband and

the wife, namely, that these lands were bought with the proceeds of the wife's shares, which were in no sense the husband's money, and also by the evidence that the husband dealt with the property as his own after the alleged advancement. The same evidence that warrants the conclusion that the money was not the separate property of the wife warrants, in our opinion, the further finding that the husband invested this money in the purchase of the lands, and subsequently the larger sum, which was undoubtedly his, for his own purposes, and not for the benefit or advancement of his wife. The appellant has wholly failed to satisfy us that the inferences of fact drawn by the primary judge are entirely erroneous, and that the judgment should be rescinded and set aside, on the ground that it is against evidence or the weight of evidence. It was also contended that, assuming the wife to be a trustee of the land for the husband, the transaction was "an acceptance of trust," and consequently a "contract" within section 3 of the *Married Women's Property Act* 1890, and that, as no evidence was given that the defendant, Mary Penglase, had separate property at the time the contract was made, she could not, according to recent English decisions upon section 4 (2), be the subject of an obligatory judgment. But the decisions referred to only determine that where damages or costs are recovered against a married woman in an action brought against her on any contract the plaintiff must prove that the married woman had separate property at the time the contract was made. In the present case no damages were recovered, or sought to be recovered, against this defendant, and execution for the costs she was ordered to pay is limited by the judgment appealed from, following the form approved of in *Scott v. Morley*, 20 Q.B.D., at p. 132, to the separate property "of the said defendant, Mary Penglase, not subject to any restriction against anticipation, unless by reason of section 22 of the *Married Women's Property Act* 1890 the property shall be liable to execution notwithstanding such restriction." The act does not limit, it extends the liability of a married woman to be sued, and undoubtedly a married woman could have been sued for the enforcement of a trust before the act was passed. The obligatory part of this judgment follows necessarily upon the indisputable power of the Court to make the declaratory part of it, and neither part of the judgment is open to objection under the act or the decisions upon the act. The appeal will be dismissed with costs against the defendant Mary Penglase, execution for such costs being limited, as in the judgment appealed from, to the separate estate of the defendant not subject to any restrictions against anticipation, unless by reason of section 22 of the *Married Women's Property Act* 1890 the property shall be liable to execution notwithstanding such restriction.

Solicitor for the defendant appellant, *Gill*; solicitor for the plaintiff respondent, *C. M. Watson*.

(Before Higinbotham C. J., Williams and Hood J. J.)

SHERSON V. AGNEW.

March 19th.

Sales by auction—Auction Sales Act 1890 ss. 3 & 21. A person who tenders for sale a particular article describes its merits, and offers it to any person who will pay a particular price for it, and then proceeds to offer similar or other articles to other persons willing to pay the same or a certain fixed price therefor comes within the second head of the definition of "sales by auction" given by section 3 of the Auction Sales Act 1890, and such person may, for selling in such manner after sunset, be convicted under section 21 of the Act.

No general rule can be laid down as to whether the improper admission or rejection of evidence is a valid ground of objection in all cases of order to review the decisions of justices.

This was an order to review an order of justices. James Sherson, serjeant of the police laid an information against Robert Agnew under section 21 of the Auction Sales Act 1890, for selling goods after sunset and the magistrates convicted the defendant and fined him £5 5s. The defendant then obtained a order nisi to review this decision on the following grounds. 1. That there was no evidence that the defendant was a licensed auctioneer. 2. That there was no evidence that the defendant was acting as an auctioneer or selling by auction. 3. That evidence was improperly admitted at the hearing. When the rule was moved absolute the first ground was withdrawn. The facts appear in the judgment.

Mr. Cussen moved the rule absolute.

Mr. Box showed cause. The justices order is perfectly good. The facts disclosed by the evidence brings the defendant within section 3 of the Auction Sales Act 1890. The second head under the definition of "sales by auction" just covers this case. There was ample evidence to connect the defendant with the placard outside the building, stating that Bruce auctions were conducted within.

Mr. Cussen.—There is no evidence that the defendant was acting as an auctioneer and that must be shewn in order to bring him within this definition because unless he was so acting then he is not selling by way of auction and there is no offence. There is no evidence to connect the defendant with the placard outside the building, and evidence as it should not have been admitted at all. *Ratray v. Roach*, 16 V.L.R. 165. It was not shewn that he put it there or authorised it to be put there.

THE CHIEF JUSTICE.—This was an information laid against the defendant under section 21 of the Auction Sales Act 1890, for selling by auction goods and chattels after sunset. The magistrates convicted the defendant, and this order to review was obtained on three grounds. The first has very properly, under the circumstances, been withdrawn. The second ground was that there was no evidence that the defendant was acting as an auctioneer or selling by

auktion on the occasion and at the time and place referred to in the information. Now, the evidence of what occurred on this occasion was shortly this: The time was between 7 and 8 o'clock on the 18th of July after sunset, and the defendant, who was the owner and manager of the hall in which these goods were disposed of, is described as acting in this way:—

"Defendant was standing on a form in front of the goods. The hall was pretty well full of people. I did not see any other person selling in the same way as Agnew. Agnew was walking on the form, and took a knife out of a pigeon-hole, and which he fully described, and stated it could not be bought for less than 1s. 6d. or 2s., and he would sell it for 1s. Some person handed up a shilling, and received the knife. Before selling the knife he opened all the blades, and pointed out a corkscrew, &c., in it. After selling this knife he took out a similar one, and offered it for sale. As no purchaser came up he put it back. He then got two screw-drivers, and held them up and offered them for sale in a similar manner, and stated he would accept 1s. 6d for the two. He sold one lot of these screw-drivers. He sold all the articles mentioned in the information in a similar manner."

It is contended on this second ground that there is no evidence that the defendant was acting as an auctioneer or selling by auction, and this raises the question as to the construction of the third section of the Auction Sales Act 1890. The first definition in the section defines the word "auctioneer" to mean and apply to

"Any person who shall sell or attempt to sell or offer for sale or resale any goods, &c. . . . by way of auction as herein defined.

Then the third definition in the section defines "sales by auction," and gives three cases of sales by auction—first, the case in which goods or lands, or any interest in either of them is sold,

"By outcry, knocking down of hammer, candle, lot, parcel instrument, machine, or any other mode whereby the highest or the lowest bidder is the purchaser."

That description applies to the case of an ordinary sale by auction, which means ordinarily an increasing or enhancing of the price of the goods sold by bidding. That is the most common sense in which the word is used. It also includes what is known as a Dutch auction, which is described as putting up property for sale at a price above its value, and gradually lowering the price until some person bids. The facts of this case do not bring it within either of the above cases. The second kind of "sales by auction" is thus referred to in this section, which proceeds—

"Or whereby the first person who claims the goods or articles submitted for sale at a certain price named by the person acting as auctioneer is the purchaser."

It appears to us that this second description is introduced to meet the very case before us. It is intended to prevent a person offering goods for sale in the way here described, a way not ordinarily used at public sales but tendering for sale a particular article, describing its merits, and offering that particular article to any person who will pay a particular price for it, and then proceeding to offer similar articles to other persons willing to pay the same price. It was argued ingeniously by Mr. Cussen that the words "acting as auctioneer" takes this case out of the present facts,

because it was not shown that the defendant was acting as an auctioneer in selling these articles, and in support of that view he describes an auctioneer as a person who at the sale sells by way of auction, and contends that a person is not acting as an auctioneer unless he is so doing. We think that that contention is met by the suggestion that acting as an auctioneer under the second head of this definition really is selling by way of auction; he is the person who has effected the sale, and it is not necessary that he should sell by way of increment or diminution of price to bring him within this particular description. The defendant here was the person who was effecting the sale of these articles to persons who claimed the goods submitted for sale at a certain price, therefore he was acting as an auctioneer, because he was selling to these persons by way of auction as described under the second head of this definition. The third ground of the order was that certain evidence was improperly admitted at the hearing. The evidence referred to is evidence that there was a notice posted up outside the building stating that Bruce auctions were conducted every Saturday evening from 7 to 10 o'clock. It was posted on a high fence adjoining the building. There is also evidence that one person who attended the hall on that evening had his attention directed to the notice during the earlier part of the day, and that he entered the hall in consequence of seeing that notice. There is also evidence that the sergeant of police communicated with the defendant on the evening of the same day as to the manner in which he was conducting his business; but the defendant claimed to have a perfect right to sell and stated that he had had legal advice on the subject, and had conducted similar sales in other parts of the colony. The evidence also shows that this sale was made on Saturday evening between the hours mentioned on the placard. Now, we think that that evidence is not unconnected with the defendant, and that it was properly admitted by the parties. We do not lay down any general rule as to whether the improper admission or rejection of evidence in all cases of orders to review is a valid ground of objection. That admission or rejection of evidence in such cases involves many considerations, and it would be difficult to lay down any general rule. The case of *Rattray v. Roach*, 16 V.L.R., 165, referred to in argument is not a case similar to this. It was decided on a different principle. We think that there was evidence to connect the defendant with this particular placard. We therefore think that on this ground also the order to review has failed. The order to review will be dismissed with costs.

Solicitor for the defendant appellant—*Gawnson and Wallace*.

Solicitors for the plaintiff respondent.—*Guinness*.

(Before Higinbotham, C.J., Williams and Hood, J.J.).

IRWIN v. THE LAND COMPANY OF AUSTRALIA LIMITED.
March 22nd.

The Water Conservation Act 1887 ss. 100 and 101 reproduced in the Water Act 1890 ss. 103 and 104.

The effect of these two sections is that a rate shall not be made until after notice has been given that water has been supplied to the district or part of the district to which the rate is applicable, but after notice has been given a rate may be made by regulation and when so made shall have the force of law which will prevent any questions being raised as to any act done precedent to the making of the rate excepting the question that no notice has been given.

It is always open to the parties as held in Shepparton Water Trust v. Jeffrey, 16 V.L.R., 42 to show that notice has not been given.

In an action by a water trust or their successors in title for rates, if it be proved that proper notice under section 100 of the Water Conservation Act 1887 and 103 of the Water Act 1890 has been given it is not open to the defendant to show that the notice is not true or that it is for any other reason open to objection. There is no power given by the Water Conservation Act 1887 such as is given by the Local Government Act to dispute the validity of a rate as a whole by proceedings to quash.

A notice under section 100 of the Water Conservation Act 1887 may be given so as to have a retrospective effect and when given is conclusive evidence of its contents and a rate in pursuance of such notice may be made retrospectively.

This was an order to review an order of justices made on a complaint for recovery of rates. The Avoca Water Trust was in 1882 created and duly incorporated under the *Water Conservation Act 1881* and its districts declared by order in council. Subsequently part of its district was declared an urban district under the *Water Conservation Act 1883*. The Trust obtained a loan and commenced the construction of its works. On the 26th August 1887 a notice in accordance with the provisions of section 100 of the *Water Conservation Act 1887* was published in the Government Gazette stating that certain parts of this district were supplied with water and on the 13th January 1888 a further notice was duly published referring to other parts of the districts but neither of these notices included the parish of Yuengroon which formed a large part of the district. Both these notices purported to be signed by M. E. Croker, as Secretary of the Avoca Water Trust, and his appointment as secretary was put in evidence. Subsequently the Trust made default by neglecting to pay interest on the loan and by neglecting to establish a sinking fund for the purpose of paying off the principal, and the Board gave the Trust two notices of its intention to enter, and on the 16th July, 1889, the Board in pursuance of section 90 of *The Water Conservation Act, 1887*, executed and took possession of the property of the Trust. There was also a mortgage executed by the Trust to the Board to secure the loan. After entering, the Board appointed the complainant in this action, Mr. W. J. Irwin, to sue for and recover all moneys due to it. Subsequently the rates (three in number) sued for were made; First—A sale amounting to £48 10s. 0d., payable on the 1st January 1890, respectively, by virtue of a regulation made by the

Board on the 24th December, 1889, in respect of all rateable property within the Avoca Water Trust District, not including the urban district. Then on the 5th September, 1890, a notice was published by the Board in the *Gazette*, stating that the parish of Yuengroon, is now, and has since the 1st January, and 1st. July 1890, been supplied with water. This notice was made retrospective in order that a rate might be made for the parish of Yuengroon, for the whole of the year 1890, and accordingly by virtue of a regulation made by the Board on the 15th September, 1890, a rate was struck (amounting to £30 10s. 0d. on the defendant's property) in respect of all rateable property within that portion of the parish of Yuengroon included in the Avoca Water Trust district, which rate was made payable on the 1st of October, 1890, and thirdly, a rate was struck amounting to £69 18s. on the defendant's property, payable on the 1st of March, 1891, in pursuance of a regulation made by the board on the 6th November, 1890, in respect of all rateable property within the Avoca Water Trust district not included within the bounds of the urban district, but including lands in East Charlton and Yuengroon. The justices made an order against the defendant for £148 10s. with £21 costs, and the defendant being dissatisfied with their decision obtained an order nisi to review it on the following grounds:—

1. That there was no evidence that the Avoca Water Trust had authorised the notices that the district had been supplied with water. 2. That there was no evidence that M. G. Croker, the person purporting to sign such notices, was the secretary of the trust. 3. That evidence tendered to show that no water had been supplied to the parish of Yuengroon, and also that no water had been supplied to any part of the trust district, was improperly rejected. 4. That there was no power to make the rate of 15th September, 1890, for the parish of Yuengroon, inasmuch as a previous rate for the year 1890 for a district including such parish had already been made. 5. That there was no power to make a rate for the parish of Yuengroon for the whole of the year 1880, or for any period prior to the notice that such parish was supplied with water. 6. That there was no evidence that the mortgage of 1st January, 1884, by the trust to the Board of Land and Works was executed properly, or by or with the authority of the trust. 7. that the evidence showed illegal borrowing and illegal expenditure by the trust, and that the rates sued for were made or required merely to pay the principal or interest on moneys so illegally borrowed or expended. 8. That further evidence tendered to show such matters as last aforesaid was improperly rejected.

Mr. Weigall moved the rule absolute.

Dr. Madden with him *Mr. Finlayson* shewed cause.

The CHIEF JUSTICE.—This is an order to review an order of justices made on a complaint to recover payment of rates claimed from the defendant by the Board of Land and Works, who became possessed of the property of the Avoca Water Trust. Claims were made in respect of, first a rate payable on the first days

of January and July respectively, 1890, pursuant to a regulation made by the Board of Land and Works on the 24th December, 1889; secondly, a rate payable on the 1st of October, 1890, by virtue of a regulation made by the board on the 15th September, 1890; and thirdly, a rate payable on the 1st of March, 1891, by virtue of a regulation made by the board on the 6th of November, 1890. Eight objections were taken on the order to review this decision of the justices. The first and second are that there was no evidence that the Avoca Water Trust had authorised the notices that the district had been supplied with water, and that there was no evidence that M. G. Croker, the person purporting to sign such notices, was the secretary of the trust. Now, in proof of the authorisation of these notices documents were put in evidence taken from the *Gazette*, which purported to be notices made by the order of the commissioners, and signed by M. G. Croker, the secretary of the trust, the first dealing with the lands included in the Avoca Water Trust, excluding the urban district, the second dealing with the lands included in this district. Both these notices were put in without objection, and they are we think a sufficient answer to these first two contentions. They purported to be made by the Avoca Water Trust, and purported to be signed by the secretary, who proved that he acted as secretary, and as they were admitted without objection they were sufficient proof to justify the magistrates in concluding that the Avoca Water Trust had authorised these notices. A third objection is that evidence tendered to show that no water had been supplied to the parish of Yuengroon, and also that no water had been supplied to any part of the trust district, was improperly rejected. This is the most important objection appearing on the face of the case. The Act requires that the rate shall not be made by a water trust until notice has been given in the *Gazette* that the district has been supplied with water. Section 100 of *The Water Conservation Act 1887* provides that—

"No rate shall be made and levied by a waterworks trust on any part of its waterworks district until notice has been given in the "Government Gazette" that such part is supplied with water under the provisions of this act."

And by section 101 of this Act it is provided that—

"Any such rate may be made by a waterworks trust by regulation, and every such regulation shall be published once in the "Government Gazette" and once in some newspaper circulating in the water supply district, and from and after such publication shall have the force of law in such district."

Now, the effect of these two sections we think plainly indicates an intention on the part of the Legislature that the whole rate shall not be made until after notice has been given that water has been supplied to the district or part of the district to which the rate is applicable. After that notice has been given a rate may be made by regulation, and when made by regulation the rate shall have the force of law so as to prevent any question being raised as to the acts done precedent to the making of the rate, excepting the question whether the notice had been given. It is always open to the parties, as has been held in the

Shepparton cases, to show that notice has not been given, but in a proceeding of this kind it is not open to a party to show that the notice was not true, or that it was for any other reason open to objections. If the notice is given by a body that is empowered to give the notice, then immediately the power to make the regulation arises, and when the regulation has been duly published according to the Act, the rate authorised by the regulation becomes law, and there is no power given by this Act as is given by the *Local Government Act* to dispute the validity of the rate as a whole by proceedings to quash. That answers objection 3. It also answers objection 4. Then follows objection 5, that there was no power to make a rate for the parish of Yuengroon for the whole of the year 1890, or for any period prior to the notice that such parish was supplied with water, but this notice states that in point of fact water had been supplied from the 1st of January 1890. And if it had been so supplied (and the notice is conclusive of the fact that it was so supplied), then the power to make a rate retrospectively arises, and we think that the board had power to make the rate in September, 1889, retrospectively for the whole year. Objection 6 is that there was no evidence that the mortgage of 1st January, 1884, by the trust to the Board of Land and Works was executed properly, or by or with the authority of the trust. There was an instrument put in which purported to be a mortgage from the Trust to the Board of Land and Works. It bears the seal of the Trust, and it appeared in evidence that the Trust had made default in not paying interest and in not forming a sinking fund, and upon such default the Board had entered and taken possession, and, thereupon made the rates. By section 90 of *The Water Conservation Act* 1887, it is provided that—

"In case default be made in payment by any waterworks trust of the interest due by it on any loan granted by the Governor-in-Council to such waterworks trust, or in forming a sinking fund, or in payment of any other moneys due under this act, the Board of Land and Works may, on giving one month's notice of such default to such waterworks trust, enter upon and take possession of its lands, tenements, and works, and maintain and manage the same, and may supply water within the waterworks district of such waterworks trust, and may do all things which might lawfully be done by such waterworks trust, in all respects as if such board were such waterworks trust."

It is unnecessary for us to decide whether it was essential that there should be a mortgage in this case at all. There was proof that a loan had been granted to this Trust by the Governor-in-Council for a particular purpose, and that there was default in carrying out that purpose. We therefore think that this objection also fails. There was evidence, if necessary, that the mortgage was executed properly. It is *prima facie* evidence through the affixing of the seal, and even if there was a deficiency in that evidence we are not satisfied that there was any need for a mortgage at all. These are all the questions that require to be dealt with, and all that were argued on the behalf of the respondent, and we think that the arguments have failed to support the grounds of review, and the order to review will be dis-

charged with costs.

WILLIAMS, J.—I only wish to say that in view of section 104 of the *Water Act* 1890, when once the regulation has been published in the *Government Gazette* and in some newspaper circulating in the water supply district, it appears to me to answer objections three, four, five, seven and eight.

Solicitor for the defendant appellant *Sherard*.

Solicitor for the plaintiff respondent, *Cuthbert, Hamilton and Wynne*.

(Before Higinbotham, C.J., and Williams and Hood, J.J.)

REGINA V. MORCE AND HOLLY.

March 24.

Mandamus—Affidavit in support—Crimes Act 1890, ss. 481, 485.

The affidavit in support of an application under section 485 of the Crimes Act 1890 for a rule nisi for a writ of mandamus directed to a judge to show cause why he should not state a case, under section 481 of the Crimes Act, 1890, should expressly state that the person who deposes to the facts was present in Court during the hearing of the trial.

This was an application under section 485 of the *Crimes Act* 1890, for a rule nisi for a writ of *mandamus* directed to a Beckett, J., calling upon him to shew cause why he should not state a case for the opinion of the Full Court in accordance with the provisions of section 481 of the *Crimes Act*, 1890.

Mr. Fisher, in support of the rule.—This is the application under section 485 of the *Crimes Act*, 1890. The affidavit in support is as follows:—

"I, John Fisher, junior, of number 10 Temperance Buildings, Swanston and Little Collins Streets, in the City of Melbourne, in the Colony of Victoria, law clerk, make oath and say:

1. That I have the conduct of this case on behalf of the defendants.

2. That the prisoners were presented under the 196th section of the *Crimes Act* 1890, before Mr. Justice a'Beckett, at the Criminal Sittings of the Supreme Court, holden at Melbourne, on Wednesday the 16th day of March, 1892.

3. That the prisoners on their arraignment having pleaded "not guilty," were placed upon their trial which continued during the whole of the day.

4. That after Mr. Finlayson, the Crown Prosecutor, had opened the case, Mr. Hodges was by the associate sworn as Chinese interpreter on behalf of the Crown, and after some argument, at the request of Mr. Fisher, counsel for the prisoners, one Ah Nun, was sworn by the learned judge himself, as Chinese interpreter on behalf of the prisoners.

5. That I am informed and believe that Ah Jack a Chinese witness was examined in chief, Mr. Hodges translating from English into Chinese and from Chinese into English.

6. That I am informed, and believe, that Mr.

Fisher for the prisoners, cross-examined Ah Jack for some time in English, and received answers in English until the witness looked presumably for help to Mr. Hodges, when prisoners' counsel requested Mr. Justice a'Beckett to cause the interpreter to remain out of sight of the witness with which request the learned judge complied.

7. That I am informed and believe that thereupon the witness no longer answered in English.

8. That Mr. Fisher then applied to have his questions answered by way of cross-examination translated to the witness by Ah Nun, the prisoners' interpreter, Mr. Hodges being still within hearing.

9. That Mr. Fisher endeavored to explain to the learned judge that no warrant had been issued until Mr. Hodges had been dispatched to Sorrento the locality of the alleged arson and interviewed Ah Jack and another Chinese witness in the case viz: one Ah Shew and that Mr. Hodges had been mixed up with the prosecution from the start.

10. The learned judge *inter alia* said that unless Mr. Fisher was prepared to say that Mr. Hodges was dishonest, that the cross-examination must be conducted through Mr. Hodges.

11. That Mr. Fisher replied that he would not allege that Mr. Hodges or any man in court was dishonest whereupon the learned judge would not allow Ah Nun to interpret, and prisoners' counsel then expressed his regret that in the exercise of what he considered his duty he would not cross-examine through Mr. Hodges.

12. That Ah Shew, the second witness was then examined in chief Mr. Hodges acting as interpreter, but was not cross-examined as the learned judge still adhered to his ruling that Mr. Hodges was the interpreter for both the crown and the prisoners.

13. That Michael Robinson Nolan, a constable, stationed at Sorrento, and several other witnesses were called for the crown.

14. That the defence was an *alibi* supported by several witnesses.

15. That the jury returned to their room shortly after four o'clock and some time later returned into court and requested the learned judge to read over the evidence of two of the prisoners' witnesses.

16. That the jury afterwards returned into court with the following verdict. viz:—"Guilty with a recommendation to mercy on the ground that there was no malicious intent."

17. That immediately after the opening of the Court next morning Mr. Fisher asked the learned judge whether he did not consider the verdict of the jury was equivalent to an acquittal—with which contention the learned judge did not agree as he considered the action of the prisoners "wilful."

18. Mr. Fisher then requested the learned judge to state a case on that point as well as on the question of disallowing the cross-examination of the two Chinese witnesses through the prisoners' sworn interpreter; but the learned judge intimated that as he had no doubt on the point he must refuse to state a case.

Sworn at Melbourne in the colony of Victoria, this 22nd day of March in the year of our Lord one thousand eight hundred and ninety-two. Before me

John Fisher, junr,
Thomas Pennefather.

A Commissioner of the Supreme Court of the Colony of Victoria for taking affidavits.

When Mr. Fisher had read the above affidavit half through he was stopped by the Court.

[HIGINBOTHAM, C.J.—One of the paragraphs of this affidavit states that the deponent was informed and believed that a certain Chinese witness was examined in chief.] The deponent was absent from the court for a short time during such examination. [HIGINBOTHAM, C.J.—That does not appear, in fact it does not appear that he was in court at any time during the trial.] Not expressly but he swears to all the facts himself with the exception of that one paragraph. [HIGINBOTHAM C.J.—This paragraph is informal and incorrect and it applies to all the affidavit having reference to the point as to the employment of the Chinese interpreter, but you may proceed with your second ground.] I submit there is sufficient information absolutely sworn to by the deponent to entitle me to argue the ground as to the employment of an interpreter.

THE CHIEF JUSTICE.—Upon further consideration we think that this affidavit should show that the person who deposes to the facts was present in Court, and with reference to the material part of the facts it is stated that he speaks from information and belief. It is not clear that a presentment for perjury would lie against the person who made this affidavit. We are not satisfied with the affidavit and refuse to entertain an application upon it.

Solicitor for the prisoners *Windsor*.

(Before Higinbotham C.J. Williams and Hood J.J.)

CAHILL V. CAHILL.

March 24th.

Practice—Supreme Court rules Order I.IV. rule 24.

Notice of motion under this rule must be served within five days of the order appealed from, and the motion must be made within eight days of the order appealed from.

This was an appeal by way of motion for a decision of Mr. Justice Holroyd's ordering the plaintiff's statement of claim to be struck out on the ground that it disclosed no cause of action. The judgment appealed against was delivered on the 10th March, the notice of motion was served on the 18th March, and the motion was for the 24th March.

Mr. Fisher appeared in support of the motion.

Mr. Duffy appeared to oppose and took a preliminary objection. The notice of motion must be served within five days from the making of the order appealed against so as to allow the motion to be made within eight days. I would refer the court to the Supreme Court Rules order LII, rule 5, and order LIV, rule 24 also to the case of *Steadman v. Hakim*, 22 Q.B.D. 16, which is a direct authority on the point and to *Warner*

v. Berger, 12 A.L.T. 208. The notice is bad and the motion is too late and I would ask to have it dismissed with costs.

Mr. Fisher in reply.—This is clearly within the eight days allowed by the rule. The order was made on the 10th March but was not delivered till the following day. I always understood the practice to be that if the notice was served within eight days it did not signify when arguments were heard.

THE CHIEF JUSTICE.—This motion is clearly made too late under order LIV, rule 24 and must be dismissed with costs.

Solicitors for the plaintiff appellant *Windsor*.

Solicitors for the defendant respondent *Casey and O'Halloran*.
(Before Higinbotham, C.J., Williams and Hood, J.J.)

GALBALLY V. WATKINS.

March 25.

Marriage Act 1890, s. 48—Illegitimate child—Evidence corroboration of mother's oath.

In a complaint for the maintenance of an illegitimate child evidence by the alleged father that he is the father of a former child is admissible and may be corroborative of the mother's oath.

Contradictory statements given in evidence by the alleged father of an illegitimate child with respect to his intercourse with the mother of the child shortly prior to the conception of the child may be corroborative of the mother's oath.

This was a special case stated by the chairman of General Sessions in obedience to a writ of Mandamus. On the 6th November the justices of North Melbourne made an order against Charles Galbally directing him to pay 10s. a week for the support of an illegitimate child of which May Watkins the complainant was the mother. Against this order the defendant appealed to General Sessions. The respondent gave evidence that the appellant was the father of the child which was born on the 7th November 1889. She also gave evidence that she had previously had a child by the appellant born on the 6th November 1888 which had only lived three weeks and three days and that the appellant had made arrangements for and paid for the burial of that child. About a fortnight after the birth of this first child the appellant came to the house where she was staying and slept in the same bed with her and about a week after the death of the child he came to her again and then came regularly until March. The appellant called by the respondent's counsel gave evidence that he was the father of the first child and had paid the expenses of the burial, but he denied that he was the father of the second child. He also sworn "In October 1888 I visited her at Mrs. Miller's. I visited her for about a month, this was before the death of the first child. After the death I do not know where she lived. I never visited her after the death of the first child. Between then and March 1889 I saw her only once at the Prahran Railway Station." In answer to questions relating to evidence given by him at the Petty Sessions Court he said "I swore that I had intercourse

with her up to the death of the child. I had no connection with her after the death of the first child. Between March and November 1889 I had no connection with her. It was contended on behalf of the respondent on the authority of *Cole v. Manning*, 2 Q.B.D. 611 that the appellant having had a child by the respondent was sufficient corroborative evidence of the mother's oath; while for the appellant it was argued that the evidence ought not to have been admitted and was not in any way corroborative of the mother as to the paternity of the child. The learned chairman in a considered judgment dismissed the appeal and affirmed the order of the justices. The learned chairman in stating the case desired to say that the reason why he had not stated a case until compelled to by *mandamus* was that he had not been asked to state a case until after the adjournment of the sessions when he refused the application considering he had no jurisdiction.

The questions for the opinion of the Full Court were—

"Was the evidence respecting the first child properly received, and ought it to have been taken into consideration as corroborative evidence of the oath of the mother?"

"Was the other evidence set forth of the appellant properly taken in consideration as corroborative?"

Mr. Power appeared to move the rule absolute.

There was no appearance to show cause.

Mr. Power, in support.—This evidence should never have been admitted, but even supposing it was properly received, it is not, and cannot be corroborative of the paternity of the child. [Hood, J., does not (*Hanley v. M'Masters*, 15 V.L.R. 322) decide this case] That case is distinguishable, there the evidence was all in respect of the child, the subject of the order, here the evidence is as to another child not the subject of the order. The case of *Cole v. Manning*, 46 L.J. (M.C.) 175 and 2 Q.B.D. 611, was decided under the English Act, 7 & 8 Vict. c. 101 s. 3, which is different from our Act. The meaning of the section in our Act (s. 48 of the *Marriage Act*, 1890) is that there must first be the mother's oath, and then there must be other facts from which the Court can reasonably infer that the person charged is the father of the child. [Williams J. In *Cole v. Manning*, it appeared that some months before the child could have been begotten, the alleged father had been carrying on some indecent familiarity with the girl, and it was held that that was admissible evidence]. [Hood, J.—There is a great difference between the English Act and the Colonial Act, in the former the mother's evidence must be corroborated in some material particulars, in the latter there is a mere negative statement. No man shall be taken to be the father of an illegitimate child on the oath of the mother alone.] [Higinbotham, C.J. If there is any evidence relative to the fact of the paternity it would be sufficient under our act.] The evidence here may possibly lend some probability to the statement of the mother but there is no evidence other than the mother's from which the justices could draw any inference as to the paternity of the child.

Phillip v. Tomlinson 2 W.W. and a'B. (L.) 92.

The CHIEF JUSTICE.—The *Manulamus* should never have gone and if the learned judge who granted it had been in possession of the facts that he ought to have been in possession of viz., that the application to state a case had not been made at the time when the appeal was heard it never would have gone. The learned chairman himself has expressed his reasons for not stating a case, he says: "I was not required to state the facts of a case until after the adjournment of the Sessions." The return to the rule however having been made we are of opinion that the learned chairman was quite correct in his decision and right in admitting the evidence, that evidence was relative to the question which he had to decide and was corroborative of the mother's evidence. The questions will be answered in the affirmative and the rule will be discharged.

Solicitors for the appellant *Gaunson and Wallace*.

(Before Higinbotham, C.J., Williams and Hood, J.J.)

THE COUNCIL OF THE BOROUGH OF HAMILTON V. KING SUN.

March 28th.

Council suing in its own name Water Act 1890, ss. 483, 525.

A local governing body may under s. 483 of the Water Act 1890, sue in its own name for the recovery of water rates and whatever may be the effect of section 525 of the Act it leaves the power given by section 483 unrestricted.

This was an order to review the decision of a police magistrate. In a complaint in which the council of the Borough of Hamilton were complainants and James King Sun was defendant for the recovery of £24 for water supplied by the complainant to the defendant by metre the police magistrate made an order against the defendant for £11 14s. 6d. with £2 7s. costs the remainder of the claim having been abandoned at the hearing. An order *nisi* to review this decision was obtained on the ground that the complainant was not empowered to sue and some person should have been appointed by the proper local governing body to collect and recover the amount alleged to be due by the said James King Sun pursuant to the provisions of section 525 of the *Water Act 1890*.

Mr. Fink appeared for the defendant below to move the order absolute.

Mr. Davis appeared for the complainant below to show cause.

Mr. Davis. The point in issue turns upon the construction of sections 483 and 525 of the *Water Act 1890*, and is whether the council were right in suing in their own name or whether they should have appointed some officer to sue for and on their behalf. Section 516 interprets "local governing bodies" to include the council of any town and by section 517 Board shall mean local governing body. Part V. of the Act relates to the supply of water by the Board and Part VI. relates to supply by Local Governing bodies and by section 517 the whole of Part V. is incorporated absolutely in Part VI. So that borough

councils may avail themselves either of section 483 or section 525. The difficulty arises from the peculiar wording of section 525 but the principle that councils may sue in their own name is well recognised, *Reg. v. Carr* 1 V.R. (L.), *Kew Board v. Whidycombe* 12 V.L.R. 347. *Pinkerton v. Heaney* 15 V.L.R. 399. [Hood J. Does not the case of *Reg. v. Templeton*, 3 V.L.R. (L) 305 dispose of this case?] It appears to. The council is the person who is to receive the money and that being so they have the right to sue, unless such power be taken away either expressly or by necessary implication which I submit has not been done in this case.

Mr. Fink. Some meaning must be given to section 525. [Hood J. supposing it were conceded that it bears the meaning you are contending for that does not take away the right to sue under section 483.] [Higinbotham C.J. Assuming that section 525 gives power to recover in the name of the local governing body does that necessarily deprive the local governing body itself from suing in its own name.] I submit that it does. The section was apparently passed for the purpose of keeping these rate accounts distinct.

THE CHIEF JUSTICE.—The objection taken to this decision is that the complainant was not empowered to sue in its own name and that some person should have been appointed to collect and recover the amount alleged to be due by the defendant. We think that the Local Governing Body (that is to say the Council of the Borough of Hamilton in this case) had the power under section 483 of the *Water Act 1890* to sue in its own name for and recover this amount. And that is quite consistent with the fact that it may also have the power under section 525 of the Act to sue for and recover the debt in its own name though it may be the effect of section 525 that the council may be empowered, if it see fit, to appoint some person, who may also sue for and recover the amount on its behalf. In all aspects of this case we think the objection fails and the order to review must be discharged with costs.

MR. JUSTICE HOOD.—I concur in the judgment of the Court but I am not prepared at present to agree with the construction put upon section 525 by the Chief Justice.

THE CHIEF JUSTICE.—I intended to say and I think I did say the council *may* have power to sue in its own name, but I do not found my judgment upon that.

MR. JUSTICE WILLIAMS.—All that is necessary to decide and all that the Court does decide is that the council may sue in its own name under section 483 of the Act.

Solicitors for the appellant *Hill for Palmer*; solicitors for the respondent *Hart and Benjamin for Samuel and Horwitz*.

SUPREME COURT SITTINGS.

(Before Holroyd, J.)

IN RE MURPHY.

31 March.

Lunatic trustee—A petition to vest the estate of a lunatic

trustee in other trustees need not be served on the lunatic.

Motion for leave to amend a petition to vest the estate of a lunatic trustee in other trustees. The Chief Clerk had refused to accept the petition on the ground among others that it had not been served on the lunatic trustee.

Mr. Weigall, for the motion. It is not necessary to serve a lunatic trustee. *Re East*, L.R. 8 Ch. 735, and *Re Green*, L. R., 10 Ch. 272.

HOLROYD, J.—Leave granted to amend the petition by adding at the foot thereof, a note, that it was not intended to serve the petition on the lunatic trustee *Murphy*. It appears by authority that such service would be a work of supererogation.

Proctors, *Pentland, Roberts and Thompson*.

Before Holroyd, J.

IN RE SPENCER.

31 March.

Supreme Court Act 1890, s. 3—Order XXVIII. r. 12
—A petition may be amended after the order is drawn up.

This was a motion by *Ellen Frances Ray* for leave to amend a petition, by adding at the foot thereof, the words "It is not intended to serve any person with a copy of this petition"; and also as the order was already drawn up, for leave to amend the order by altering its date to that of this day.

Mr. Pennefather, for the motion. A petition is included in a pleading *Supreme Court Act 1890, s. 3*, and may therefore be amended at any time even after the order has been made *Order 28 r. 12. D.C.P. (Ed. 6) p. 1570*.

HOLROYD, J. Order made.

Proctors, *Duffett, Brown and McCulloch*.

Before a'Beckett J.

DESPEISSIS v. MELBOURNE MACKAY SUGAR COMPANY, LIMITED.

4, 7, April.

Practice—Costs—Judicature Act order 55 rr. 69 & 70.
—On a summons to vary a certificate of the chief clerk the costs will usually follow the event.

Summons to vary certificate of the chief clerk.

The facts are not material to the part of the judgment reported.

Mr. Hayes for the plaintiff to support the summons.

Mr. Bryant for the defendant to oppose.

cur. ad. vult.

A'BECKETT J. after dealing with the facts said:—As to the costs of the summons I consider the case of *re Watts*, 22 Ch. D. 5, an unsatisfactory authority for the proposition that no costs should be given on a summons to vary. I prefer the rule as stated in the *Annual Practice 1892*. "The costs of an application to vary, usually follows the result and are not made costs in the cause." Moreover the *Judicature Act Order 55 r. 69* refers to the old practice of "exceptions" to the Master's report for which it substitutes the new pro-

cedure of taking the opinion of the judge. The costs of exceptions to the Master's report were always dealt with in the discretion of the court according to the merits and I think a similar practice should prevail on a summons to vary. To say that a party might always appeal from a decision of the chief clerk without risk as to costs would be to encourage vexatious, appeals and careless arguments of important questions arising in the chief clerk's office. The defendant fails in its appeal on all points but the last, which is comparatively unimportant, and as to which it succeeds by reason only of additional evidence which was not brought before the chief clerk. I therefore think that the defendant should pay the plaintiff the costs of and occasioned by the summons to vary, and I order accordingly.

Solicitors for plaintiff *Malleson, England & Stewart*.
Solicitors for the defendant *Blake and Riggall*.

PROBATE JURISDICTION.

(Before Holroyd, J.)

IN THE WILL OF HOGAN.

31 March.

Probate—When the testator's wife is appointed executrix, with a provision in the will that, in the event of her marrying again the testator's son is to take her place as regards the will, probate will be granted to the wife, reserving leave to the son, on her marrying, to apply for probate.

The testator, *Michael Hogan*, died on the 11th November, leaving a will by which he appointed his wife, *Polena Hannah Hogan*, and *Patrick Hogan*, executrix and executor, and containing the following provision:—"In the event of my wife *Polena Hannah* marrying again, my son *Arthur James Hogan*, is to take her place as regards this will."

Mr. Wasley for the motion.

HOLROYD, J.—Probate granted to *P. H. Hogan* and *P. Hogan*, reserving leave to *Arthur James Hogan* to apply for probate in the event of the widow, *P. H. Hogan*, marrying again.

Proctors, *Higgett, McLaughlin and Wrigley*, Geelong.

(Before Holroyd, J.)

IN THE WILL OF McCARTY.

31 March.

Application for administration c.t.a. of the unadministered estate of a testator by a Company authorised so to apply by the executors of the testator's surviving executor, there being children of the executor who are sole beneficiaries under the will, and the eldest of whom is nearly of age, refused.

Application for administration with the will annexed.

John McCarty, the testator, died on 18th February 1877, having by will appointed *Daniel McCarty*, *James Crough*, and *Richard Felon*, his executors, and leaving five children, the eldest of whom was then about five years old, who were to share equally in the

estate. Probate of this will was granted to Daniel McCarty and James Crough, leave being reserved to Richard Fehon to come in and prove. Daniel McCarty predeceased James Crough, who died on the 26th July 1891. Richard Fehon renounced probate of the will of John McCarty on 15th January 1892. By his will James Crough appointed three persons to be his executors and trustees. These executors authorised the National Trustees Executors and Agency Company to apply for probate of this will, which they did, and obtained. The estate of John McCarty was at the death of James Crough still undistributed. The present application was by the Company mentioned above, who were authorised so to do by the executors of James Crough, for administration with the will annexed of the unadministered estate of John McCarty.

Mr. Guest for the motion.

HOLROYD, J.—I should like to know the wishes of the children, the eldest of whom must be now nearly of age, also what are their ages. Motion refused.

The application was, on 7th April, renewed before Williams, J., on affidavits giving the information required by Holroyd, J., and stating that the children were all willing that the motion should be granted.

WILLIAMS, J.—Motion granted.

Proctors, *Lynch and Co.*

(Before Holroyd, J.)

IN THE WILL OF PERRY.

3, 31 March.

Probate—Where a duplicate will is submitted for probate there must be an affidavit by some person who knows that the document is a duplicate.

Where there are unimportant alterations in a will, some initialled, and others not, and all appear to have been made at the same time, the Court will grant probate with both classes of alterations. The Court will itself examine the will and determine when the alterations were made.

In an affidavit in support, the place of business of a solicitor is a sufficient description of his residence, but not of that of a solicitor's clerk. The full name and residence of attesting witnesses must be supplied when possible.

Motion for probate.

The facts fully appear in the judgment.

Mr. Weigall, for the motion.

Cur. adv. vult.

HOLROYD, J.—On the 3rd of this month Mr. Weigall moved the Court to grant probate of a will and three codicils of Charles Perry, deceased, formerly bishop of Melbourne. These documents were stated to be duplicates of a will and three codicils left by the deceased, and intended to be proved in England. The testator died in England on the 2nd of December, 1891. By the will of which probate is sought Henry Henty, Thomas a'Beckett, and William Edward Morris are appointed executors and trustees as to the testator's property in Australia, and certain other persons therein named are appointed executors

and trustees as to all his estate and effects, excepting his Australian property. Mr. Morris has made an affidavit, in which he says, that after the death of the deceased, he received from Sydney Gedge, Esquire (one of the testator's English executors, and a member of the firm of Gedge Kirby and Millet, who had been the testator's solicitors in London, and whom by his will he directed to be employed as solicitors to his estate) a letter, from which the following are extracts:—

"The Bishop" (meaning the late Bishop Perry) "made a will and three codicils in duplicate, leaving one part in my care and keeping the other himself, and it has been my intention to prove one part here and to send you the other. But hitherto the search for the other part amongst his papers has been fruitless. I can only find the third codicil, and if the original will and two codicils are not found I suppose it will be necessary to send you an official copy of the probate when the other originals have been produced. Meanwhile, I send for your information an examined copy of the will and codicils."

With this letter Mr. Morris received a document containing what appeared to be copies, though not *fac-similes*, of the will and codicils of which I have been asked to grant probate. Subsequently he received a further letter from Mr. Gedge, enclosing that will and those codicils. Mr. Morris deposes that he has himself examined that will and those codicils, with the documents containing the copies sent out by Mr. Gedge, and finds that they are identical. He also states that the copies are examined copies of the originals in England, but this he could not know except from the information which he obtained from Mr. Gedge. There is no such evidence before me as the Court is in the habit of acting upon to show that the documents sent out here as examined copies of originals in England are what they have been stated to be; or otherwise to verify what is alleged, that the will and three codicils of which I have been asked to grant probate are in reality duplicates. In my own mind I have not the least doubt about the matter; but the Court has always been accustomed, and I think very properly, to require an affidavit from someone who can speak of his own personal knowledge either to the fact which it is sought to prove or to facts which go to prove it. In the case of *John Cust* (9 V.L.R., I.P. and M., 55), a testator, who died possessed of property in Victoria and also in New South Wales, had executed duplicate wills, his object being to enable probate to be obtained in each colony as of an original document. The Court granted probate of one of them, directing the fact of there being a duplicate to be specially mentioned in the grant. But there the existence of the duplicate was mentioned in the *testamentum* of each will, which ran thus—"In witness thereof, I the said John Cust, the testator, have hereunto and to a duplicate hereof set my hand, &c.;" nor have I any reason to suppose that the usual affidavit, showing the document not before the Court to be a duplicate, was in that case dispensed with. The will submitted for probate contains a number of interlineations and other alterations, mostly very insignificant. It appears to have been written with a typewriter, and a good many mis-spellings have been corrected by striking out letters or writing one letter

over another. Some of the alterations have been initialled by the testator. "Candlebrum" has been cancelled and "Candelabrum" written over it on the first page of the will. On the fifth page the word "my" has been struck through, and the word "any" written over it, so that the sentence runs now—"And my Australian trustees shall pay to my wife any sums standing to my account or current account in any bank in Australia at the time of my death," whereas it read before, "in my bank in Australia." On the sixth page the word "anything" has been interlined to come between the words "notwithstanding" and "herein contained." The last line of the seventh page has been struck out, and the first line on the eighth page inserted. These are the only alterations that have been initialled, and in my opinion none of the others are of any importance. One of these and only one, might be so, viz., the change of the word "my" into "any," if it should turn out that at the time of the testator's death there were sums of money standing to his account or current account in more banks than one in Australia. There was no extrinsic evidence to show at what time the interlinations and obliterations appearing on the face of the will were made, and when that is the case the presumption usually is that they were made after the execution of the will. The will itself affords no clue to the time when they were made, except in the nature of the alterations. It is certainly more probable that the mistakes of the typewriter should have been corrected before than after the execution of the will. In *In the will of Purvis* (3 V.L.R., I.P. and M., 39) Mr. Justice Molesworth said:—

"The will was prepared and engrossed by a solicitor in town, who sent it to the testator, and the testator expressed to him an intention of altering it. The attesting witnesses say that just before its execution the testator, in their presence, initialled various interlinations and alterations in the will, but that they cannot identify such, but believe that the will, when executed, was in its present state. It was not read. There are a number of interlinations in the will, all marked with the testator's initials, also of obliterations, none of them so marked, but some of them corresponding with the interlinations—that is, words rendered unfit by the interlinations. As far as I can judge, the interlinations, the obliterations, and signatures of execution were written with the same pen and ink and at the same time. I think that this affords sufficient evidence to enable me to admit to probate the document with all initialled interlinations, excluding all obliterations the beginning of which is under an interlineation.

"Obliterations" in the above extract means "words attempted to be obliterated;" and the case is an authority for admitting initialled alterations to probate where some were made previously to execution and all appear to have been made at the same time. The will of the late Mr. Justice Stephen was a holograph will, containing some very trifling alterations, and the Court granted probate with the alterations (*Re Stephen's Will* 7 V.L.R. I.P. and M., 69.) The judge there, following the case of *In re Hindmarsh*, looked at the will for himself, and concluded that the alterations were made at the time when the will was written, in which opinion he was fortified by the evidence of an expert who had examined the will. In

In the will of Armstrong (6 A.L.T., 48.) Mr. Justice Molesworth granted probate of a will as altered where the alterations were absolutely unimportant, although no witness was found who could depose whether they were made before the execution of the will or not, but one of the witnesses swore that they were in the handwriting of the testator. This case comes nearer to the present than any other which I have been able to discover, but is not exactly parallel. Were I to grant probate of this will I should be disposed to grant it with all the alterations excepting those which have been initialled, unless it could be proved to my satisfaction that the minor corrections had been made at the same time as the initialled ones; and I would allow the will to be examined by some expert with a microscope, with the view of establishing that fact, if possible. (See *re Riddell's will*, 6 V.L.R., I.P. and M. 5.) But besides the defective evidence as to the testamentary papers alleged to be duplicates, there are other objections to the granting of probate. In the affidavit of the executors the full names of the attesting witnesses are not stated, and the place of his employment is given as the residence of one of them, an articulated clerk. This may seem a small matter, but it is not so by any means. The fourth rule of the *Regule Generales* of the 23rd of June, 1873, directs that every application for probate of a will, or for administration with the will annexed, shall be supported by an affidavit or affidavits, setting forth, amongst other things, the name and residence of each executor and of each of the subscribing witnesses thereto. The object of the rule as to the witnesses is, that in case after the will has been proved in common form, the executor should be called upon by any party interested to prove the will in solemn form *per testes*, it should be possible to discover as easily and expeditiously as possible where the attesting witnesses may be found. The necessity of procuring their evidence may arise after many years; and I think it important that the rule should be complied with as strictly as it can be. The name of a witness is his full name. Residence is a word of variable meaning. Primarily I think it signifies a place where a man has his home, which would usually be where he slept. After a lapse of time inquiries as to the whereabouts of a solicitor would most probably be satisfactorily answered at his former place of business; and I should accept the place of business of a solicitor as a sufficient description of his residence. But a solicitor's clerk may shift his residence to any part of the world, and no record be kept in the office of what has become of him, and in his case I should not consider the place of business of his employer a sufficient description. The residence to be set forth is, in my opinion, the residence at the time when the affidavit is sworn; or if that cannot be ascertained, then the last-known place of residence. When, after reasonable endeavours to procure the necessary information, the executors find themselves unable to comply with the rule strictly, they should state in their affidavit the grounds on which they ask that compliance may be dispensed with. A dispensation on one ground is apt to lead to applications for

dispensation on different grounds, and an argument frequently ensues as to how far the Court can safely permit a departure from established practice, even when the departure has been occasioned by neglect or inadvertence. The late Sir Robert Molesworth, who may be said to have moulded the whole practice in the probate jurisdiction of the court, uniformly required that the full name and residence of the attesting witnesses should be supplied when possible; and I myself, and I believe other judges have consistently followed his ruling. (See *re Cook*, 10 V.L.R., I.P. & M., 93; *re Fisher*, 14 V.L.R., 693; and the following unreported cases, with which I have been kindly furnished by the registrar, viz.—*re Patrick Houlihan*, 9th March, 1882; *re Isaac Watson*, 9th February, 1882; *re August Freitag*, 13th April, 1882, before Molesworth, J. *Re Donald M'Askill*, 23rd August, 1888; *re Patrick Gleeson*, 19th June, 1890; *re William Eckersley*, 30th August, 1883; *re Robert Davis*, 16th August, 1888; *re Duncan Ewens*, 16th August, 1888; and *re Alfred Burchett*, 6th December, 1888, before myself.) In a case where, in the body of the affidavit filed by the executors their names were given in full, but one of them Dudley Mitchell Hayea, signed the affidavit Dudley Hayes, Molesworth, J., refused the motion for probate (*re Hayes*, 6 A.L.T. 64). I observe that the commissioners before whom the affidavits of the executors respectively, and of Mr. William Edward Morris, were sworn, have described the will in each case as "the exhibit referred to in the annexed affidavit." The will, which, including the outside sheets, consists of nine sheets of paper, bears no mark, as far as I can see, of ever having been annexed to any affidavit. Two letters were also handed up to me, which are referred to in the affidavit of Mr. Morris as letters "hereunto annexed," and they are described by the commissioner before whom his affidavit was sworn as "exhibits referred to in the annexed affidavit." The exhibits were fastened together with a pin, but the affidavit itself bears no mark of having been annexed to any document. I think the practice of thus describing exhibits which are not annexed is irregular and may be confusing. Upon the materials now before me I must refuse the application for probate.

Proctor, *Michie*.

(Before Williams, J.)

IN THE WILL OF McCALLUM.

7 April.

Practice—Executor's commission—Where executors have passed their accounts the Court directed the Chief Clerk to allow commission and to fix the amount.

This was an application under the *Administration Act* 1890, s. 26, by the executors of Daniel McCallum that they should be allowed commission. From the affidavits it appeared that the executors had passed their accounts with the Chief Clerk.

Mr. Anderson, for the motion, cited *In the will of Hugh Short*, 7 V.L.R. 25.

WILLIAMS, J.—*In the will of Hugh Short* is a case

where the executor had not passed his accounts. I direct the Chief Clerk to allow commission to the executors and to fix the rate per cent.

Proctors, *Pentland, Roberts, and Thompson*.

(Before Williams, J.)

IN THE ESTATE OF DAY.

7 April.

Administration—Where administration had been granted to the intestate's father, who had died before swearing the administration bond; on an application for administration by the intestate's brother the Court required to know whether the father had left a will, and if so, what was its effect.

Application for administration.

It appeared from the affidavit of the applicant, Alex. E. Day, that James Day, junior, died on 11th October 1891 intestate, that his father, James Day, senior, obtained administration of his estate on 10th November 1891, but died on 6th March 1892, without having sworn the administration bond. Alexander E. Day, the brother of James Day, junior, now applied for administration, with the consent of the widow.

Mr. Lewers for the motion.

WILLIAMS, J.—It is not stated in this affidavit whether the father of the intestate left a will or not. The Court ought to be informed whether he did, and if he did, what the effect of the will is. Motion refused.

Proctor, *Mr. C. M. Watson*.

PRACTICE COURT.

(Before Hood, J.)

ROSS v. COSTELLO.

28, 30 March.

Pounds Act 1890, s. 30 (1).—*Notice in the Government Gazette, although prima facie evidence of the existence of a pound, is not the only evidence—The limits of a pound need not be proclaimed—Notice to the owner of impounded cattle is not necessary to make the impounding legal—A poundkeeper's statement unobjected to at the time is sufficient evidence of his appointment.*

Order to review order of justices.

Robert Costello was, on the 24th February at Sale, on the information of George Ross convicted by the justices of rescuing impounded cattle. Evidence was given at the trial that the informant was poundkeeper, that cattle of the defendant were impounded on the 27th January, escaped on the 28th, and on the 29th were brought by the defendant and put into a yard, as to which there was a conflict of evidence whether it was the pound yard or the mustering yard. The *Government Gazette* 1860 was put in, appointing a site for a pound, and the *Government Gazette* 1866 notifying the removal of the pound from that site to a "site in the Sale Common mustering yards now in part occupied by yards and including "an area to be hereafter defined." Evidence was

further given that on the cattle being placed in this yard the informant forbade the defendant to remove them, stating that they had been impounded and had escaped, but notwithstanding this the defendant did remove them in the presence of the informant. The grounds upon which the order *nisi* was obtained fully appear in the judgment.

Mr. Serjeant moved the rule absolute.

Mr. Cussen, in showing cause, cited *Lodge v. Rowe*, 1 V.L.R. (L) 65; *Jones v. Falvey*, 5 V.L.R. (L.) 230.

HOOD J., after stating the facts said.—The first ground of objection is “that there is no provision in section 5 of the *Pounds Act* 1874 and section 4 of the *Pounds Act* 1890, for removal of a pound as mentioned in the *Gazette* of 1866.” I think this objection is taken under a misapprehension of the law. Under section 4 of the *Pounds Act*, 1890, places may be appointed as pounds “from time to time,” and the notice in a Government *Gazette*, although under section 27 it is *prima facie* evidence of the establishment of a pound, is not the only evidence. The defendant himself, who has taken advantage of the *Crimes Act*, 1890, says that there was a pound. In addition to this, I am not sure that the Act does not give power to remove a pound. Sec. 4 provides for the establishment of pounds and section 7 contemplates their removal. The second objection is “that there were no proclaimed limits of the alleged pound.” I do not think that it is necessary that a pound should have any proclaimed limits, although, of course, it must have limits. The third objection is “that there was no evidence that on the 27th January 1892, the cattle referred to were legally impounded, and that no books had been produced showing that they had been legally impounded.” This objection is pointed to the fact that no notice of impounding was given to the defendant, and that books were not produced before the justices. I should say, that if these facts were correct, it would not make the cattle any the less impounded. I think this objection also fails. The fourth objection is “that the alleged poundkeeper did not on the 27th January, receive and subsequently detain the said cattle in his custody.” I feel totally unable to understand this objection. Section 20 provides that the poundkeeper shall receive and detain cattle lodged in the pound, and section 28 (VII) imposes a penalty on a poundkeeper who fails to comply with any of the provisions of the statute. What follows from that I do not understand. The fifth objection is “that no *Gazette* notice was produced containing notice of the appointment of the informant as poundkeeper.” At the beginning of the case the defendant's solicitor said that he refused to admit anything and insisted on strict proof. He made no objection however, when the poundkeeper proceeded to give oral evidence as to his appointment. This is not the right way to take objection to evidence. It is not sufficient to say at the outset “I object to any evidence that is not strictly legal,” and then to allow the evidence to go in without objecting. Moreover the defendant himself says that the cattle were impounded. They could not be impounded without the existence of a poundkeeper. The poundkeeper is

a public officer, and such an officer discharging a public duty need not produce his official appointment, the fact that he is so acting is sufficient. The sixth objection is “that on the 29th January the cattle were legally in the custody of the defendant, that he drove them to the mustering yards for a legal purpose, and the informant had no right whatever to interfere with them whilst in the yards for that purpose, he having failed to detain them in his custody, and they having been found at large by the defendant.” I feel some doubt about this objection. The cattle were on the 27th January legally impounded, they escaped on the 28th, and got back into the possession of the real owner. He took them on the 29th to some place, about which there is some doubt whether it was the pound or not, and I should hesitate to say that a man was guilty of pound rescue in such circumstances. But I am not to reverse the decision of the magistrates unless they were clearly wrong. And I think there is sufficient evidence upon which they could act. Indeed even according to the defendant the cattle were in a place over which the poundkeeper had some control, for he locked a gate in the yard in which they were. In some doubt then, I decide on this point against the defendant. The last objection is, “that no criminal intent was proved, and this is essential to sustain a conviction under this section.” If the defendant “wilfully” takes the cattle out of the control of the poundkeeper, he is guilty of the offence. That he did it wilfully he himself admits in his evidence. The order will be discharged with costs.

Solicitors for informant, *Patten and Staveley*, Sale.

Solicitors for defendant, *Gill*, agent for *Serjeant and Pace*, Sale.

(Before Williams J.)

SHIRE OF CAULFIELD V. EVANS.

8 April.

The Supreme Court Act 1891 s. 5 does not apply to orders *nisi* to review orders of Justices not in Petty or General Sessions, which are therefore still returnable before the Full Court.

Order nisi to review order of Justices.

The Justices at Caulfield made an order for rates under the *Local Government Act* ss. 288 and 293 against the defendant George Evans.

It appeared that the Justices were sitting at the Courthouse of Petty Sessions but it did not appear that they were sitting in Petty Sessions.

Mr. Mitchell to show cause, took a preliminary objection. The Court has no jurisdiction to hear this motion. *The Supreme Court Act* 1891, (No. 1208) s. 5, only applies to orders *nisi* to review orders of Justices sitting in General or Petty Sessions and not to orders of Justices out of Sessions, and as the justices in this case were sitting as Justices only, this order *nisi* should be made returnable to the Full Court under the *Justices Act* 1890 ss. 141 & 146.

Mr. Irvine to move the rule absolute asked that if his Honor was pressed by this objection, he would

enlarge the time for the return of the order nisi under sec. 143 of the *Justices Act* 1890.

WILLIAMS J.—There is no doubt in point of fact that this is an order of Justices. I think this objection is fatal. In exercise of the power conferred on me by the *Justices Act* 1890 s. 143, I enlarge the time for the return of this order nisi until April 22nd.

Solicitors for complainant: *Fink, Best & P. D. Phillips.*

Solicitors for defendant: *Smith, Emmerton & Johnson.*

IN CHAMBERS.

(Before Williams, J.)

PATERSON v. MCCARTHY.

8th and 11th April.

Rules of Supreme Court 1884 *Order III. r. 6 (F)*
Order XIV. r. 1.

Specially endorsed writ—Mortgage—Attornment—Landlord and tenant.

Where, by a mortgage deed the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry on default, and default was made.

Held, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Order III. r. 6 (F) and that therefore a writ to recover possession of the land could, under the circumstances be specially endorsed.

Application on behalf of the plaintiff for leave to sign final judgment under *Order XIV. r. 1.*

The writ was endorsed as follows:—

Statement of Claim.

The plaintiff's claim is that he is entitled to the possession of all that piece of land with the appurtenances thereto [land described] and he is also entitled to the possession of all that piece of land with the appurtenances thereto [land described].

On 11th November 1890 the defendant, by instrument in writing under the provisions of the *Transfer of Land Act*, mortgaged the said lands to the plaintiff and by clause 14 of the said instrument the defendant attorned and became tenant of the said lands with the buildings thereon to the plaintiff from year to year at a yearly rental provided by the said clause and payable as thereby provided, and by the said clause it was agreed by and between the parties that it should be lawful for the plaintiff at any time after default should have been made in the performance or observance of any of the covenants in the said instrument contained or implied and on the part of the defendant to be performed or observed without giving any previous notice or making any demand to enter upon and take possession of the said land and buildings and to determine the said tenancy created by the said attornment.

Default was made in certain of the covenants in the said instrument contained or implied, namely, the covenant contained in the 2nd clause of the said instrument to pay to the plaintiff on 7th November and 7th May respectively in each year interest on the sum of £6500 or so much thereof as was unpaid at the rate of 28 per centum per annum, such default being the non-payment of £266 interest or any part of the said sum due on the 7th November 1891 or at all. Default was also made in the covenants to pay rent under the said clause 14 inasmuch as no payment of rent has ever been made, and the rent due on the 7th November 1891, namely £266 has not been paid nor has any part thereof.

On the 4th March 1892 the plaintiff by his agent Joseph Peter Turner entered upon and demanded possession of the said lands and gave to the defendant notice in writing to forthwith quit the said lands whereby the said tenancy was determined, but the defendant refused and still refuses to deliver up or quit possession of the said lands and remains in wrongful possession thereof.

The plaintiff claims:—Possession of the said lands.

It was objected on behalf of the defendant that the present action was not the subject of special indorsement under *Order III. r. 6*

Mr. Mitchell in support:—Contended that the cause of action was the subject of special indorsement and cited *Daubuz v. Lavington*, 13 Q.B.D., 347; *Mumford v. Collier*, 25 Q.B.D., 279; and *Hall v. Comfort*, 18 Q.B.D. 11.

HIS HONOR said.—I will consider the matter.

HIS HONOR on a subsequent day said:—This is an application on behalf of the plaintiff under *Order XIV. r. 1*, for leave to sign final judgment. There is substantially no defence to the action on the merits, and the question turns on the construction of *Order III, r. 6*. It was contended on behalf of the defendant that this cause of action did not come within the words "In actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit." The action in this case was a claim that the plaintiff was entitled to possession of the land upon the ground that the defendant had made default under the covenant to pay rent. There was the usual clause of attornment. I must say that if this matter had been *res integra* I should have said that this class of action did not come within the words of the rule before mentioned. The English case of *Daubuz v. Lavington*, 13 Q.B.D., 347, was, however, cited, which was followed by the cases of *Hall v. Comfort*, 18 Q.B.D., 11, and *Mumford v. Collier*, 25 Q.B.D., 279, which decide that an action of this nature can be subject of special endorsement. As I cannot satisfactorily distinguish the present case of *Daubuz v. Lavington*, I think the best plan is to follow the English decisions, although I do not agree with them. I shall make no order as to costs; execution to be stayed for three days.

Solicitors—For plaintiff, *Brahe & Gair*; for defendant, *Little*.

SITTINGS IN BANCO.

(Before Higinbotham C J., Williams and Hood J. J.)

OWEN v. KENDALL AND OTHERS.

March 14th.

Public Service—Promotion—Civil Service Act of 1862.

No. 160, s. 21.—Public Service Act 1883, No. 773, s. 2.—Public Service Act 1890, No. 1133, s. 2.

The system of promotion provided for under the Public Service Act 1883, applies to all classified officers in the public service including officers classified under Act No. 160.

Section 2 of the Public Service Act 1883 does not preserve a right of prior promotion to officers classified under Act No. 160, as against officers classified under the Public Service Act 1883.

A saving clause in an Act of Parliament which is repugnant to the body of the Act is void.

Brown v. The Queen, 12 V.L.R. 397, distinguished.

(*Per Hood J.*)—*The result of section 21 of Act, No. 160, was to tie the hands of the Governor-in-Council and so limit the choice for promotion in cases of vacancies to the members of a particular class, and the utmost Section 2 of the Public Service Act 1883 does is to tie the hands of the Governor-in-Council as they were tied before by limiting him in filling vacancies in the fourth class to a choice from the members of the fifth class who are legally there at the time of the promotion.*

This was a rule *nisi* for an information in the nature of a *quo warranto* obtained by one Theodore Owen calling upon a number of fellow officers in the public service to show cause why they should not be ousted from their respective offices on the grounds that such officers were not as against the relator entitled to hold such offices and as against him retained them improperly. The rule *nisi* was granted by His Honour Mr. Justice a'Beckett and was made returnable before the Full Court.

The relator is a clerk in the fifth class of the public service, and assists the actuary for friendly societies in preparing tables of rates of contributions. He entered the service in 1877 as a junior clerk in the railways, and was placed on the staff in July, 1881. In September of that year he was transferred to the statist's office, and on the 14th December, 1881, he was classified as a fifth class officer under Act No. 160, the *Civil Service Act* of 1862. After the passing of the *Public Service Act* 1883 he was on the 1st of January, 1885, classified under that act as a fifth class officer of the clerical division, and has ever since remained so classified. Since the last-mentioned date a number of vacancies have occurred in the fourth class of the clerical division, to which various officers, viz., Louis R. Berteau (Customs), James T. Belcher (Customs), John Shea (Water Supply), Charles J. Dunne (Public Works), William F. G. Irvine (Audit), George H. H. Agg (Penal department), Joseph Kendall (Post-office), Simon J. Priestley (Customs), and Lawrence B. Hanna (Money Order department), have been appointed, all of whom the relator asserts have been wrongfully appointed over his head, and contrary to his rights under section 21 of the *Civil Service Act* 1862 and section 2 of the *Public Service Acts* of 1883 and 1890 respectively.

Dr. Madden moved the rule absolute.

Mr. Box and *Mr. Higgins* showed cause.

Cur. ad. vult.

March 31st.

THE CHIEF JUSTICE:—The first only of these cases has been argued. It was agreed that all the other cases involve the same question, and will be governed by our decision in the first case. This is a rule *nisi* calling on Joseph Kendall to show cause to

the Full Court, to which the matter has been referred, why an information in the nature of a writ of *quo warranto* should not be exhibited against him to show by what authority he claims to exercise the office of a clerk in the fourth class of the clerical division of the public civil service of Victoria. The ground of this rule is stated to be that at the time Joseph Kendall was promoted from the fifth class of the clerical division, and took upon himself the office of a clerk in the fourth class, there were also in the fifth class of the clerical division divers persons who had been duly classified within the meaning and under the provisions of the Act No. 160 and of the Act No. 773 and of the Act No. 1,183, of whom the relator, Edgar Theodore Owen, was one, and who were therefore entitled to have been promoted to the fourth class of the clerical division of the public civil service of Victoria, under the provisions of the Act No. 773 and the Act No. 1,183, in priority to the said Joseph Kendall, who had never been classified under the provisions or within the meaning of the Act No. 160. This claim of the relator is founded upon section 2 of the Act No. 773, the *Public Service Act* 1883, as interpreted and applied by this Court in the case of *Brown v. The Queen*, 12 V.L.R., 397. Section 2 is in the following terms:—

"From and after the passing of this Act the Act No. 160, being an Act to regulate the civil service, shall be and is hereby repealed, save and except as to all matters and things done under and to all the privileges and rights now existing or hereafter accruing of all persons now subject to the provisions of that Act, and all such persons shall in every other respect be subject to the provisions of this Act in the same way and to the same extent as if they had been appointed after the passing hereof, save and except as to being required to pass any examination."

The claim of the relator expressly sets up a title in himself and in all other persons in the 5th class of the clerical division to the rights of promotion existing under both the Acts No. 160 and No. 773. It was admitted in argument that the relator's claim amounted to this, that he and all other officers in the 5th class of the clerical division, whose rights as classified officers under Act No. 160 were preserved by section 2 of Act No. 773, were entitled to be promoted into the 4th class in priority to all other officers in the 5th class who had had no right of promotion under the Act No. 160 so preserved to them. The same title to promotion, if it exists, would extend to the same class of officers throughout the higher ranks of the public service. The claim as it is thus presented is, in my opinion, quite unfounded, and a wholly inadmissible claim. It might be less untenable, although I do not think that it would then be a good claim, if it asserted a right on behalf of all officers classified under Act No. 160 to be treated as a continuing, separate, and independent branch of the public service, with the professional division and the ordinary division with its five classes preserved for their separate benefit, and having the right to be promoted in such divisions and classes by a different authority and on different grounds from all other officers in the Public Service coming within the Act No. 773, but without any rights under Act No. 160. Such a claim could not be held, in my opinion, to be consistent with

the general scope and with many of the express provisions of the Act No. 773, but it would not be self-contradictory as the relator's claim, in the form in which he now puts it, appears to me to be. For he claims at once the right to be classified with all other officers of the Public Service under the Act No. 773, and to have the rights of promotion accruing to him under that classification, while at the same time he insists that he and others possessing similar preserved rights should be promoted by an authority acting under different conditions (i.e., the Governor-in-Council alone, and not the Governor-in-Council acting on the recommendation of the Public Service Board) and upon a different ground (i.e., desert, to be judged of by the Governor-in-Council, and not seniority and merit combined) from those by which the promotion of fellow officers in the same division and class are to be determined. The right claimed by the relator, therefore, is not only opposed to the rights of other officers in the same class granted by the Legislature to all officers alike, but it is inconsistent with the right he claims for himself, for there is no power to promote an officer to a higher class in the clerical division, except in the mode and upon the terms provided by the Act No. 773, and these the relator refuses to accept. As the relator has not presented his claim under the Act No. 160, standing alone and apart from the Act No. 773, I have not thought it necessary to consider whether his claim is one that could be supported as a legal right under the first-mentioned Act alone, and I express no opinion as to whether, if that Act alone were still in force, an objection by the officers in any class of the ordinary division to the promotion in priority to them of any officers classified in the same division and class who had been admitted under a different examination or without examination, could be sustained. The system of classification of the civil service under Act No. 160, and of the public service under Act No. 773, though they have some features in common, are entirely distinct and independent systems. The later act was designed to include departments of the public service not provided for by the earlier act. A much larger number of persons employed in the public service are classified under it than were included in the classification under the first act. The rules for the appointment and promotion of officers and the regulation of the service under Act 773 are in many respects different. It is impossible, therefore, in cases where competing claims of officers, all of whom are under the new system, have to be considered and determined to apply to a portion of those officers the rules which govern the rights of that portion under the old system. I think that it was the clear intention of the Legislature that the system of promotion under Act 773 is to apply to all classified officers in the public service, including the relator, and those who hold a similar position under the Act No. 160, in accordance with the rules of promotion laid down by the Act No. 773. This determines, in my opinion, the question we are now considering, and shows that the right of prior promotion claimed by the relator is not one of the

rights preserved by section 2 of Act No. 773. A saving clause in an act of Parliament which is repugnant to the body of the act is void—Per Lord Coke in the case of *Alton Woods*, 1 co. rep., 40 B. 316, cited and followed in the *Corporation of Yarmouth v. Simmons*, 10 ch. div. 518, where Fry J., on page 527, observes:—"I think that when the Legislature clearly and distinctly authorises the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone because the thing cannot be done without abrogating the right." It has been contended that this question has been already decided in effect by this Court in *Brown v. The Queen* 12 V.L.R. 397. If that be so we could not, in accordance with our practice, go behind and review that decision in the Full Court constituted as this Court is now constituted. I was a member of the Full Court which decided that case, I dissented from the judgment of the Court, but I am, of course, bound by it, although I am not bound by all the reasons assigned for, but not essential to, the decision. The single point determined in *Brown v. The Queen*, 12 V.L.R., 397, was that officers of the public service appointed under Act No. 160 are not affected by section 76 of the *Public Service Act* 1883, which gives power to the Public Service Board, with the consent of the Governor-in-Council, to reduce the number of officers in any department or to dispense with the services of any officers, and that the modes and causes for dispensing with the services of such officers are still governed by section 27 of the Act No. 160, which reserves power to the Governor-in-Council to dispense with the services of any officers for either of the reasons therein stated. There is a marked difference between the right claimed and allowed by the Court in that case and the right claimed in the present case. The right allowed by the Court in *Brown v. The Queen*, 12 V.L.R., 397, only affected the class of officers to whom the right was held to belong. The allowance of that right did not interfere with the rights of other officers who were classified for the first time under the *Public Service Act* 1883. But the right now claimed by the relator, if it should be allowed, would postpone and thereby affect very injuriously the rights of promotion of officers outside the protected class, and it would thus clearly contravene the rules of promotion which the Legislature intended to apply to all officers alike who should be classified under the later act, I am of opinion for these reasons, that the rule in each of these cases, should be discharged, and with costs.

MR. JUSTICE HOOD said,—The relator in these cases alleges that he had certain rights of promotion under Act No. 160, which were preserved to him by section 2 of Act No. 773, and that these rights have been infringed. It is necessary, therefore, to understand clearly what those rights really were. By section 21 of Act No. 160 it was provided that—

"When in the ordinary division any vacancy occurs in any superior class, if it be expedient to fill up such vacancy, the Governor-in-Council, except as hereinafter provided, shall promote from the class next below that in which the vacancy has occurred, such officer as he shall judge the most deserving of such promotion."

That is the right which that statute gave to officers with regard to promotion. Vacancies in a class (with certain exceptions not here material) are to be filled from the class next below it—that is to say, the officers in the 5th class have the first claim to promotion to the 4th, and so on in each class. There is to be no skipping of any class in favor of the members of a class below it. The real intention of the Legislature is plain. It was to ensure to the public service a regular system of gradation, so that (unless in certain exceptional circumstances) no member of that service could find that his classified junior was promoted over his head. Each civil servant was in respect to promotion to be brought into competition with the members of his class only. If this be all the relator's rights they have been preserved to him by section 2 of No. 773, but on the facts of these cases they have not been infringed. He, however, contends that his rights are far more extensive. He says that his right is not only that competition should be limited to members of his own class, but that such competition must be confined to those members of his class who have entered it in the same way as he did, viz., by examination. I cannot find in the statute any trace of such an extended right. It is true that Act No. 160 provided for examinations as a test for entrance to the civil service, but I do not see that this has anything to do with the right of promotion in section 21. If the relator's contention were correct it would follow that the standard of the entrance examinations could not be altered without infringing the rights of every member of the whole civil service. This view would also lead to the conclusion that section 2 of No. 773, which purports merely to save existing rights, did really create them. For under No. 160, even on the relator's view, there would be new men entering the service continually by examination who would be in competition with him. But as now no more can enter in that way he would be free from competition, except from those who were in the service when No. 773 was passed. In course of time, then, as those men are moved on by promotion or death, his chance of promotion increases until, if he survives, his right becomes an absolute one. In point of fact it was boldly put in argument that the effect of section 2 of No. 773 was to create a close corporation consisting of the then members of the various classes; that those members constituted in each class a body having preferential rights to promotion against all new-comers; and that until every member of such class had been promoted no new appointments could be made in any higher class. I cannot believe that such a state of things was ever intended, and it is not in my opinion anywhere expressed. The result of section 21 of No. 160 was to tie the hands of the Governor in Council, and so limit the choice for promotion in cases of vacancies to the members of a particular class. While the section does this much, it does not confer any right upon the members of any class to complain when the Legislature sees fit to alter the mode of admission to that class. The saving clause in No. 773 at the utmost can only tie the hands of the

Governor-in-Council as they were tied before, by limiting him in filling vacancies in the 4th class to a choice from the members of the 5th class who are legally there at the time of the promotion, and as that is what has been done in these cases the relator must fail. It must not be supposed that I do not assent to the views expressed by his Honour the Chief Justice, but I have preferred to base my judgment on the ground which impresses me most.

Solicitor for the relator, *F. J. S. Stephen*; solicitor for the respondent, *Guinness*.

(Before Higinbotham, C.J., Williams and Hood, J.J.)

DUNTON V. DUNTON.

March 17th.

Agreement—Consideration.

(*Per Higinbotham, C.J., and Williams, J.; Hood, J., dissentiente*)—*An undertaking by a divorced wife to "conduct herself with sobriety and in a respectable, orderly, and virtuous manner," is a sufficient consideration to support a promise by her late husband to pay her a certain sum of money per month while she shall so conduct herself.*

(*Per Hood, J., dissentiente*): *Such an agreement is void for uncertainty.*

(*Per Higinbotham, C.J.*): *A promise not to do or to do something which the promisor may lawfully and without wrong to the promisees do or abstain from doing is a good consideration to support a promise by the promisees.*

This was a special case stated by a judge of County Courts. John Dunton, the defendant, entered into an agreement with Louisa Dunton, the plaintiff, his divorced wife, that he would pay her £6 a month so long as she conducted herself with sobriety and in a respectable, orderly and virtuous manner. The defendant neglected to pay the amount stipulated, and the plaintiff brought an action against him in the County Court to recover the sum of £6. The learned judge who tried the action reserved for the opinion of the Full Court the question whether the agreement was binding or a *nudum pactum* for want of consideration.

Mr. Skinner for the plaintiff.—The agreement is not a *nudum pactum*. The consideration is an implied promise by the plaintiff that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. There is no compulsion on her to do so. The benefit to the defendant is the absence of annoyance and disgrace that would attach to him and his children if the plaintiff misbehaved herself. The previous relationship of the parties is sufficient consideration for the promise. *Gibson v. Dickie*, 8 M. & S. 463.

Mr. Cussen for the defendant.—There is no consideration for the agreement. All that the plaintiff promises to do she is already legally bound to do, and such a promise does not constitute a good consideration. *Jamieson v. Renuick*, 17 V.L.R., 127; *White v. Bluett*, 23 L.J., Ex. 36.

Cur. ad. vult.
March 31st.

Mr. Justice Hood, *dissentiente*—Louisa Dunton sued John Dunton in the County Court to recover the sum of £6 as the amount agreed to be paid by the defendant under a written agreement, for the maintenance of the plaintiff. At the trial a question was raised as to whether the alleged agreement was binding upon the defendant, and that question was reserved for the opinion of this Court. The document is called a memorandum of agreement and apparently was signed by both parties. It recites that they had been married, but that the marriage had been dissolved on the petition of the husband, and it then proceeds as follows:—

“And whereas, notwithstanding the said dissolution, the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she the said Louisa Dunton shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Now, this agreement witnesseth that in consideration of the premises the said John Dunton agrees to pay the said Louisa Dunton the sum of £6 per month.”

It then contains a proviso that in the event of Louisa Dunton committing any act whereby she or the said John Dunton may be subjected to hate, contempt or ridicule, or if she shall not conduct herself with sobriety, and in a respectable, orderly, and virtuous manner, and with all respect to the said John Dunton then he may put an end to the agreement. The motive of the defendant in signing this document is clear. He desired to provide for the woman who had been his wife, and who was the mother of his children in such a way as to induce her not to disgrace herself, him, or them. But the question we have to decide is whether this document constitutes a valid agreement, and we have nothing to do with the motives of the parties except so far as they are expressed in a binding legal document. A man's motives cannot form any consideration for a contract. If this document is to be held binding upon the defendant it must be because there is some legal consideration moving from the plaintiff upon which the defendant's promise is founded. In my opinion the only consideration expressed on the face of the document is the defendant's desire to make provision for the plaintiff, and that clearly would not be sufficient. It was, however, contended that the real consideration is an implied promise by her that she will conduct herself with sobriety and in a respectable orderly and virtuous manner, and that the benefit to the defendant would lie in the prevention of the annoyance and disgrace that might be caused to him and his children in the event of the plaintiff misbehaving herself. I cannot imply such a promise from the document, but even if it were expressed therein it would not, in my opinion, constitute a consideration for the defendant's agreement. A promise, in order to be a good consideration, must be such as may be enforced. It must therefore be not only lawful and in itself possible, but it must also be reasonably definite. Now, a promise by a woman that she will conduct herself with sobriety and in a respectable, orderly, and virtuous manner, seems to me to be about

as vague a promise as can well be imagined. What are the acts which she is to do or to refrain from doing? What is the meaning to be attached to the words if looked at in the light of a definite promise? A promise by a woman that she will conduct herself with sobriety may mean that she will not drink intoxicating liquor at all, or that she will not get drunk; or it may mean that she may do either or both so long as she does not do so in public. So with conducting herself in a virtuous manner. Is that in public or in private, and does it include anything short of unchastity? As to respectability and order, they are words of such varying meaning that I cannot understand any agreement about them. All this makes me unable to see any promise whatever made by the plaintiff in this document, and in any event forces me to the conclusion that such a promise is too uncertain to form the consideration for any legal agreement. A contract founded upon such an illusory consideration appears to me to be as invalid as a promise by a father made in consideration that his son would not bore him (*White v. Bluett* 23 L.J., Ex. at p. 37 per Parke B), and it is not nearly so certain as an agreement by a married woman that she would attend upon her aged father and mother as long as they lived, and provide them with necessary services, and in consideration thereof her father should, when requested, transfer to her his interest in certain land, an agreement which the late Mr. Justice Molesworth considered void for uncertainty (*Shiels v. Drysdale*, 6 V.L.R. Eq., 126). It must be remembered that we have not here to consider a case of a plaintiff being induced to alter her position by reason of a promise made by the defendant. The plaintiff does not allege that she did or refrained from doing anything depending upon the defendant's promise. If she had stated that she did not get drunk as she otherwise would have done, or that she remained chaste or orderly or respectable solely in consequence of the defendant's promise, and relying thereon, she might perhaps have brought herself under a different rule, but the very suggestion of such a statement shows to my mind the impossibility of its ever forming the consideration for the contract upon which alone she sues. For these reasons I find myself unable to concur in the judgment of the Court.

THE CHIEF JUSTICE:—This is a special case by the learned judge of the County Court at Melbourne under section 135 of the *County Court Act* 1890. The question reserved for the opinion of this Court is whether the agreement (Exhibit A) in the action is binding, or is *nudum pactum* for want of consideration. The agreement is in the following terms:—

“Memorandum of agreement made and entered into this thirtieth day of August, 1890, between John Dunton, of Carlton, in the colony of Victoria, contractor, and Louisa Dunton, of the same place, formerly the wife of the said John Dunton. Whereas the marriage had and solemnised between the said John Dunton and Louisa Dunton was on the 12th day of March, 1890, dissolved by the Supreme Court of the Colony of Victoria, upon the petition of the said John Dunton, and whereas notwithstanding the said dissolution the said John Dunton is desirous of making provision for the said Louisa Dunton so long as she the said Louisa Dunton shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner—Now this agreement witnesseth that in consider-

ation of the premises the said John Dunton hereby agrees to pay the said Louisa Dunton the sum of six pounds per month from the first day of September, 1890, she thereout maintaining and clothing herself; such sum to be payable on the first day of every month during the continuance of this agreement, the first of such payments to be made on the first day of September, 1890. Providing always that in the event of the said Louisa Dunton at any time committing any act whereby she or the said John Dunton may become subjected to personal hate, contempt, or ridicule, or if the said Louisa Dunton shall not conduct herself with sobriety and in a respectable, orderly, and virtuous manner, and with all due respect to the said John Dunton, then the said John Dunton may at his option immediately cease the payment of the above-mentioned sum and put an end to this agreement."

I am of opinion that this agreement is binding, and that it is not *nudum pactum*, or void for want of consideration. It has been contended for the defendant that the written agreement discloses no consideration for the defendant's promise to pay the plaintiff £6 per month, that this promise therefore was a purely voluntary one, and performance of it cannot be enforced by action. The agreement was signed by the plaintiff. The terms of it clearly imply, in my opinion, a promise on her part that she will conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. But it was said that this was only a promise to do that which the plaintiff was already bound to do, and that such a promise does not constitute a good consideration. It is true that if a person promises not to do something which he cannot lawfully do, and which, if done, would be either a legal wrong to the promisee, or an act forbidden by law, such promise is no consideration for the promise of the other party to the alleged contract founded on mutual promises. The case of *Jamieson v. Remick*, 17 V.L.R. 124, and the authorities there cited support that rule. But they also show that a promise not to do or to do something which the promisor may lawfully and without wrong to the promisee do or abstain from doing, is a good consideration. In the present case the plaintiff was released by the decree for the dissolution of marriage from her conjugal obligations to the defendant to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner; and conduct of an opposite character would not necessarily involve a breach on her part of any human law other than the law of marriage, which had ceased to bind her. She was legally at liberty, so far as the defendant was concerned, to conduct herself in these respects as she might think fit, and her promise to surrender her liberty and to conduct herself in the manner desired by the defendant constituted, in my opinion, a good consideration for his promise to pay her the stipulated amount. I am of opinion, for this reason, that there was a good legal consideration to support this agreement, and I answer the question accordingly. The proper order as to costs of the hearing of this case will be that they abide the event of the action.

Mr. Justice WILLIAMS said,—In my opinion there is a consideration for the agreement upon which the plaintiff sues, and it is binding upon the defendant as long as the plaintiff observes her undertaking, necessarily implied in the agreement, that she will conduct herself with sobriety and in a respectable orderly, and

virtuous manner. The plaintiff signs this agreement and she is bound by it, and the penalty upon her, if she fails to observe her undertaking, is that immediately she does so fail all benefit to her under the agreement ceases. The defendant's promise to pay her the £6 per month is stated in the agreement itself to be made "in consideration of the premises," and one of those premises is the plaintiff's undertaking to conduct herself with sobriety, and in a respectable, orderly, and virtuous manner. Then, it is said, this undertaking of hers is nothing, as it only amounts to an undertaking by her to do that which she was under a legal obligation to do. From this proposition I dissent. She was under no legal obligation to the defendant or to anyone not to get drunk in her own or any friend's house. She was under no legal obligation to the defendant or to anyone not to consort with persons, male or female, of bad moral character. She was under no legal obligation to the defendant or to anyone not to allow a paramour to have sexual connection with her. She was entitled in these and other respects to pursue her own course of conduct. Now, turning to the facts as gathered from the agreement and the evidence, it appears that the defendant had obtained a divorce from the plaintiff, and that the issue of their marriage had been five young children, all living at the time the agreement was made. It is true, and it is most important to bear in mind, that with the dissolution of the marriage her conjugal obligations to the defendant ceased. It was perhaps by reason of this consequence that the defendant entered into this agreement with the plaintiff, and procured her to enter into it with him. It may have been, and probably was, of some moment to the defendant to hold out a substantial inducement to the plaintiff to agree to conduct herself and to conduct herself in the manner stipulated by himself. She had been his wife, she was so no longer, but she still remained the mother of five young children. Remaining under no conjugal obligations to him, he probably deemed it advantageous and desirable that she who remained the mother of his children should conduct herself in such a way as not to bring discredit upon her offspring. In effect he says to her, "If you, who now owe me no duty as a wife, will agree to my stipulation I will, so long as you observe that stipulation, pay you £6 per month." Thereupon she signifies her agreement and her assent to observe that stipulation by signing the agreement. The case of *White v. Bluett*, 23 L. J. Exch., p. 36, is in my opinion, not an authority against the view I have taken. In that case Pollock, C. B., came to the conclusion that the agreement set up by the son was *nudum pactum*, and so no answer to the father's cause of action, upon the express ground that the son had no right to complain of the father's distribution of the property, for the father might make what distribution of his property he liked, and the son's abstaining from doing what he had no right to do could be no consideration. My answer to the question stated is that there is sufficient consideration to support the agreement sued on.

Solicitors for the plaintiff *Lyons and Turner*.
Solicitors for the defendant *Connelly and Tatchell*.

(Before Higinbotham C. J., Williams and Hood J. J.)

NIXON v. AH FOOK.

March 22 & 23.

Service of summons—Justices Act 1890, s. 23, (1).
(Per Higinbotham C. J. and Hood J. Williams J. dissentiente). The words "his place of business" in section 23 (1) of the Justices Act 1890, are not limited to cases where the defendant is the master or one of the masters of the business but extend to cases where the defendant is merely employed as a servant or officer.

(Per Williams J. dissentiente) "His place of business" in section 23 (1) of the Justices Act 1890, mean the place of business of the defendant, the place where he carries on business and of which he has the control.

This was an order to review an order of the Justices at Melbourne convicting the defendant Ah Fook on an information charging him with selling to one James Cook, a lottery ticket. The defendant did not appear and proof was given that a true copy of the summons had been left for the defendant with a person apparently of the age of 16 and upwards at 64 Little Bourke Street, Melbourne, where the defendant has been seen employed in the business of selling lottery tickets. An order nisi to review the decision of the justices was obtained on the ground that there was no evidence before the justices that the summons had been delivered to some person apparently of the age of 16 at the defendant's last or most usual place of abode or business.

Mr. Forlonge moved the rule absolute on behalf of the defendant below.

Mr. C. A. Smyth shewed cause on behalf of the complainant below. The rule was obtained on the ground that there was no evidence before the justices that the summons had been delivered to some person apparently of the age of sixteen years or upwards at the defendant's last or most usual place of abode or business. The mode of service is set out in section 23 (1) of the Justices Act 1890, and the same section provides that proof of service may be in one of two ways either by the affidavit of the person who served the summons or by the orally given evidence of such person. Both these methods were carried out in this case. Evidence was given that the summons was served at the defendant's place of business. It is purely a question for the justices' what is a person's last or most usual place of business. *Exp. McEvoy*, 6 V.L.R. (L), 424, 425.

Mr. Forlonge.—There is a special method of service prescribed by the Act and that special method must be followed and there must be evidence before the justices that that special method has been followed. Where a complainant undertakes to prove service by affidavit he cannot turn round and use the other method. The methods are distinctive not cumulative. *Ray v. Justices of Melbourne*, 17, V.L.R. 186. The service was defective in that it was not served at the defendant's place of

business. His place of business is his own place of business, not his master's place of business. All that was proved was that the defendant was seen at some house selling lottery tickets. I say his place of business is the place where he carries on his business, his own business, a business of which he is the master. [Hood J.: Where would you serve a clerk in a bank; according to your contention service at the bank would not be sufficient.] A bank clerk has no place of business within the meaning of this Act. It is difficult to find authorities because the words "place of business" do not occur in the English Act. In the *County Court Rules*, rule 13, *Victorian Statutes*, Vol. I., p. 692, the County Court judges have laid it down that "place of business shall not be deemed to be place of business of a defendant unless he shall be the master or one of the masters thereof. There is a case of *Blackwell v. England*, 8 El. & Bl., 541, where the words "place of business" are dealt with. The object of the Justices Act is to lay down some rule by which process may be fairly concluded to reach the defendant. [Williams, J.: It seems to me that we ought to limit this meaning as far as possible.] The Justices Act deals with criminal offences and should therefore be strictly construed. [Hood, J.: What do you say is the meaning of his place of abode? Must he have any property in it?] It means his residence, where he eats, sleeps, and drinks. It is not necessary that he should be the owner of it. [Hood, J. I cannot see why the word "his" with reference to the word "above" should be construed differently to the same word with reference to the word "business."] The reason for such a distinction is I submit this. A person's place of abode is where he lives and would probably be known, so that a summons left there for him would probably reach him. But suppose he is employed in a large factory, many of the employes are perfect strangers to one another. [Hood J.: In *Blackwell v. England*, 8 El. & Bl. 541, and also in *Attenborough v. Thompson*, 2 H. & N. 559, it was conceded all round that "his place of business" was where the person was a clerk.] If "business" is to include "employment" there is no proof that any business was being carried on by the defendant at this place.

Cur. ad. vult.

Counsel subsequently handed up to the Court *Buckley v. Hann*, 5 Ex. R. 43; *Sangster v. Kay*, 5 Ex. R. 386; *Graham v. Lewis*, 22 Q.B.D. 1.

March 31st.

Mr. Justice WILLIAMS, dissentiente—What becomes of this particular case is comparatively immaterial, but it must be a matter of the greatest moment what construction we place upon subsection 1 of section 23 of the Justices Act 1890. *Audi alteram partem* is the corner stone of the administration of justice, and, for the purpose of the due observance of this mandate, proceedings have from time to time been prescribed as the means of enabling the person complained against, be it criminally or civilly, to be heard, or to have the opportunity of being heard, if he so pleases. Not to go too far back into past legislation, I may begin with the proceeding of personal service. At one time every summons, whether for a criminal or a penal offence or

for a civil proceeding, was required to be personally served upon the defendant. Then, in consequence of defendants in some cases keeping out of the way and taking other means to evade service, upon proof that such was the case power was given to effect substituted service for personal service, but in such a mode as to render it highly probable that the process so served would come to the defendant's knowledge. Then from time to time by various provisions introduced into various acts modes of substituted service have been provided, rendering it less probable that knowledge of the process would be brought home to the defendant; and, finally, we have reached a stage at which the law instead of providing with reasonable certainty that a defendant shall have the opportunity of being heard makes it highly probable that in many cases there may be an adjudication of a criminal, penal or civil nature against a defendant behind his back, and without his having ever heard or known of the institution of proceedings against him. The 23rd section of the *Justices Act* 1890, subsection 1, the subsection which the Court have in the present case to consider and to put an interpretation upon, is an apt illustration of what I mean. That section prescribes how a summons to answer an information or complaint (a criminal as well as a civil proceeding) may be served, and one of the modes is this, "by leaving the same with some person (other than the defendant) apparently of the age of 16 years or upwards for the defendant at his last or most usual place of abode or business." This mode is prescribed by the subsection as a mode for *original* service, the same section proceeding to state that if this mode of original service cannot be effected a justice may order substituted service to be effected by advertisement or otherwise. Now, construing the words "at his last or most usual place of business" in the manner in which I understand the majority of the Court to construe it, namely, as the place where the defendant is, or has been, last employed, the reasonable certainty of the issuing of the process coming to the defendant's knowledge is secured in the following way:—If an information be laid against A, who is a hand (subordinate or superior) in a large foundry or manufactory, good *original* service of a summons to answer that information may be effected by leaving a copy of the summons with any boy apparently of the age of 16 years (not necessarily either an inmate or apparent inmate, or a fellow employé or apparent fellow employé) who may happen to be at such foundry or manufactory at the time. The book-keeper in a large firm, the overseer of a factory, the most subordinate hand in a foundry, may in this way be considered to have had good original service effected upon them. This must be the effect of holding "his last or most usual place of business" to mean the place where the defendant has last been, or is, employed, and, if this be law, then the observance of the mandate *audi alteram partem* tends to become little better than a farce. For the reasons I have stated, I am not disposed to whittle away any further than I am forced by authority to do, the just and equitable rule that a defendant who is being prosecuted

or sued should have the fact that he is being so prosecuted or sued brought to his knowledge with reasonable certainty. I am glad, therefore, to find that to construe the words "his last or most usual place of business" as meaning the place where he has been last, or is employed, is opposed to authority, and this brings me to a consideration of the authorities upon the question. In *Buckley v. Hann*, 5 Ex., p. 43 (which was not a case of service), the question arose what was the meaning in an act of Parliament of the words, "provided the defendant shall carry on his business within the city of London," and it was held that a clerk in the Admiralty, employed as such in the city, did not carry on business there so as to come within the proviso. In *Sangster v. Thay*, 5 Ex., p. 386 (not a case of service), the same question arose under the same words in another act, and it was held that a clerk to the Privy Council was not a person who could be said to "carry on his business" within the meaning of the act, and that those words meant something more than "employment." It is said that these two authorities have been overruled by the later case of *ex parte Breuill in re Bowie*, 16 Ch. Div., p. 484, but this is not so, for they were never brought to the attention of the Court, and if *ex parte Breuill* is to be considered as overruling the two cases in 5 Exch., much more clearly may it be considered to have been in turn overruled, and the two cases in 5 Exch. rehabilitated, by the late decision of *Graham v. Lewis*, 20 Q.B.D., p. 780, affirmed on appeal in 22 Q.B.D., p. 1. In *ex parte Breuill* the words of the rule were "carry on business," and in the course of the argument, Lush L.J., at p. 485, makes the observation, "The rule does not say *his* business." That again was not a case of service, and it is needless to observe that the construction of these and similar words may well be stricter when we consider that the object and intention of statutory provisions as to "service" is presumably to affect the defendant with notice or knowledge of the process as Lush, L.J., in the case of *ex parte Breuill* says, "The words in question are susceptible of a wider or narrower interpretation, and in order to interpret them we must have regard to the object and intent of the rule." In *Lewis v. Graham*, 20 Q.B.D., p. 780, the same question arose as to whether a clerk employed by a solicitor at offices in the city of London "carried on business" there, so as to fall within the words "carry on business" in an act of Parliament, and it was held that he did not "carry on business" in the city of London. Lord Coleridge, in delivering judgment in that case, says, "If the question in this case were *res integra* I should say that it is only where a person is employed in business of his own, carrying on business in the ordinary sense of the words, that the Court has jurisdiction. In a certain sense the defendant was carrying on business, because he was employed in the city, but that is not a fair interpretation of the words; the business must be some business in which he has control, or acts as one of the partners engaged in carrying it on. That would be my opinion if the matter were new, but it is not new." Lord Coleridge then gives

as his reason for this statement the two decisions in 5 Exch., cites them with approval, recognises them as authorities, and makes the significant observation that neither of those cases was present to the mind of the Court in *ex parte Brouill*, in 16 Ch. Div., and Mr. Justice Matthews follows Lord Coleridge in very much the same strain. This case of *Lewis v. Graham* then went to the Court of Appeal, 22 Q.B.D., p. 1, which affirmed the decision of Lord Coleridge and Mr. Justice Matthews; Fry, L.J., at p. 5, observing:—"I think that the expression 'carry on business' is not ordinarily used in the sense of a person doing business merely. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion, it imports that a person has control or direction with respect to a business, and also that it is a business carried on for some pecuniary gain. If that be so, it is evident that this solicitor's clerk does not carry on business;" and Lopes, L.J., in his judgment, cites the two cases in 5, Exch. with approval. Now, the words of the section we are considering, when expanded, read "at the last or most usual place of abode of the defendant, or at the last or most usual place of business of the defendant," and if similar words in acts providing for matters trivial in comparison with the matter provided for in section 23 of the *Justices Act* 1890 are to be given the narrowest construction (though capable of a wider) stated in the authorities which I have cited, *à fortiori* should the narrower construction be placed upon these words in a section which is prescribing the means by which a defendant may be presumed to be affected with knowledge of the issue of process against him. The authorities I have cited apply *à fortiori* to the present case, and, in my opinion, conclude the question. Some of those authorities admit that the words are capable of a wider or narrower interpretation, but hold that we must look to the object and intent of the section in order to ascertain whether the wider or narrower construction is to be applied. In this case I have no doubt whatever that the narrower construction should be applied. Provisions as to original service are, I regret to say, lax and perilous enough; and, for myself, I should be pleased to find some intention on the part of the Legislature in this respect to retrace its latest steps. It is astonishing to find that, in provisions made for the service of summonses on garnishees, it is stipulated that the service shall be "on a person apparently an inmate at the last-known place of abode or business of the garnishee, and that no place of business shall be deemed to be the place of business of the garnishee unless he be the master or one of the masters thereof," and that, in such a serious and grave matter as that of original service of summonses, to show cause against criminal and penal informations, the most lax provisions, couched in the most lax and ambiguous language, have been allowed to become law. I think the words "his place of business," in subsection 1 of section 23, mean the place of business of the defendant, the place where he carries on business, and of which he has the control. As, however, the majority of the Court think otherwise, the order to review must be

discharged with costs.

THE CHIEF JUSTICE.—Order to review the conviction on an information charging Ah Fook with selling to one James Cook a ticket by which permission was given to the said James Cook to compete in a certain lottery, by which prizes of money were to be competed for by a certain mode of chance, within the meaning of the *Police Offences Act* 1890, section 37. The defendant did not appear, and proof was given that a true copy of the summons had been left for the defendant with a person apparently of the age of 16 years and upwards at 64 Little Bourke Street, Melbourne, on 29th August 1891, where the defendant had been seen employed in the business of selling lottery tickets. The order to review was granted on the grounds that there was no evidence forthcoming before the justices that the summons to answer the information on which the above conviction was made had been delivered to some person apparently of the age of 16 years for the said Ah Fook, at the said Ah Fook's last or most usual place of abode or business. The sufficiency of the service of a summons is entirely for the determination of the justices (*ex parte McEvoy*, 6 V.L.R. (L), 424), but where a special method of service is prescribed by an Act of Parliament that method must be followed. the *Justices Act* 1890, section 23 (1), provides that—

"Every summons shall be served at least seventy-two hours before the hearing thereof (by a member of the police force, or other person, upon the person to whom it is so directed by delivering a true copy thereof to such person himself, or by leaving the same with some other person apparently of the age of 16 years or upwards for him, at his last or most usual place of abode or of business."

It has been contended by Mr. Forlonge that a lottery-shop was not "a place of business" of the defendant in the absence of proof that it was a place occupied by and under the control of the defendant for his own business. I do not think that the expression "place of business" as it occurs in this section of this Act fairly admits of the limitation thus proposed to be applied to it. It is an ambiguous expression, like "place of abode," and both expressions, as well as similar terms in other Acts and rules, require to be construed and to be carefully applied in every case in accordance with the object and intent of the Act or rule in which they occur. (See *per James, L.J.*, in *ex parte Brouill in re Bowie*, 16 Ch. Div. 487.) The defendant was proved to have occupied or been employed at this place in the business of selling lottery-tickets, and the place may be properly regarded therefore as his place of business, although the business was not his own business. It is obvious that there is a risk of injustice arising in isolated cases from either of these two methods of original service. Personal service is the only absolutely safe mode of service, but the Legislature has adopted these additional methods with a knowledge of the consequences; and the inconveniences and difficulties attendant upon personal service which the Legislature sought to remove, would be renewed if we were to apply a limitation of meaning to these expressions, "place of abode" or "place of business," which the ordinary meaning of the terms

employed appears to us not to warrant. The order to review will be discharged with costs.

Mr. Justice HOOD.—The object of the Legislature in passing section 23 of the *Justices Act* 1890 was to facilitate the service of summonses and the proof of such service. Personal service would in many cases be difficult, and so it is provided that service may be effected on the defendant by leaving a true copy with some person apparently of the age of 16 years or upwards at his last or most usual place of abode or of business. It has been contended that a defendant's "place of business" must be limited to cases where the defendant is the master or one of the masters of the place. This interpretation would very much cut down the beneficial effect of the section, and would restrict its application to those cases where there would ordinarily be little trouble in serving a defendant in person, inasmuch as if he were the master of the place he ought as a rule to be easily discovered. I think that this contention is not correct, and that the words bear their ordinary meaning and refer to the place where a man is employed in business in the same way as the preceding words refer to the place where he has his abode, even though he is not master thereof. To read the words otherwise would give the word "his" a different meaning as applied to place of abode from that which it would bear in reference to place of business. His "place of abode" does not mean the place which belongs to him, but the place where he abides. A man living in a coffee palace, hotel, or lodginghouse, or residing at home with his parents, has his place of abode where he lives, though he is not the master or owner thereof. Even in the case of a man who hired a particular room in a lodginghouse it would be very literal language to speak of the room and not the house as his place of abode, and to require service on a person at that room would in most cases destroy the efficacy of the enactment. So with "his place of business." The pronoun does not imply ownership of the place or of the business carried on there, but it is used colloquially to express the place where the person performs his business. Any uncertainty as to the summons reaching the defendant will arise whatever interpretation is put upon these words, because that uncertainty is caused by the absence of any limitation as to the person apparently of the age of 16 with whom the summons is to be left. In view of this uncertainty it seems to me that justices ought to be very particular in requiring strict proof of service when the provisions of this part of section 23 are made use of, and the defendant does not appear. I concur with his Honor the Chief Justice that the rule should be discharged with costs.

Solicitor for plaintiff, respondent, *Guinness*.

Solicitor for defendant, appellant, *Kane*.

(Before Higinbotham, C.J., Holroyd and Hood, J.J.)

IN RE KERIN AND LYNCH.

April 1.

Legal Profession Practice Act 1891, s. 11, sub-sec. 2.
Barristers or solicitors admitted to practice in any part

of Her Majesty's dominions, other than in Victoria, who seek to be admitted to practice as barristers and solicitors of the Supreme Court of Victoria, must not only prove that they have obtained a qualification of equal value to that prescribed by section 11 of the Legal Profession Practice Act 1891, but must also show that all the qualifications existing in that part of Her Majesty's dominions from which they come, are equal to the Victorian standard created by the above-mentioned section.

These were two applications on behalf of Frederick George Kerin and James Lynch for admission to practice as barristers and solicitors of the Supreme Court of the Colony of Victoria. The application was supported by affidavits sworn by the applicants, which set out that they had been admitted to practice as solicitors of the Supreme Court of Judicature of Ireland, and that they had given the proper notices with respect to their admission to this Court. The affidavits then set forth the course of examination and the subjects therein through which it was necessary to pass prior to their admission in Ireland, which consisted of a preliminary examination, something like the matriculation, three intermediate examinations embracing numerous legal, literary and mathematical subjects, and a final examination covering what may be termed general law.

Mr. Bryant for Mr. Kerin, I submit that the qualification held by an Irish solicitor is equal to that which is required by section 11, sub-sec. 2 of the *Legal Profession Practice Act*. If section 11 is looked at carefully it would appear to mean that the qualification that is necessary is the qualification that was required by a person who was a barrister or who was a solicitor under the old rules, that is to say, the word respectively should be read into the section. [HODGE, J.: We have now in this colony only one profession which originally consisted of two, and it seems to me that the legislature has set up a certain standard which is intended to mean that no person shall be admitted to that profession unless he shall be qualified to practice both as a barrister and as a solicitor.] [HOOD, J.: The difficulty I feel is that it seems to me that the Legislature intended to be prohibitive, otherwise what is the meaning of the *Amending Act*, No. 1229.] That Act was merely passed to protect vested interests, and is not to be read as explanatory of the original Act in any way.

Mr. Duffy for Mr. Lynch. The *Amending Act*, No. 1229 ought not to, and cannot, have any effect upon the construction that should be placed on this section. What the Legislature meant was that in any event whatever, the *Legal Profession Practice Act* might mean there were certain persons who were entitled to protection, but there was no intention to put any particular construction on the original Act. The facts set out in the affidavits show that the applicant's qualifications are as great as those required by section 11. It is impossible for the Court to arrive at a scientifically accurate knowledge of any person's qualification from England or Ireland, and I submit the Court should put a liberal construction on this section.

Cur. ad. vult.
April 11th.

THE CHIEF JUSTICE.—Application was made to the Full Court on the 1st instant, on behalf of each of these gentlemen, that he should be admitted under the *Legal Profession Practice Act* 1891, to practise as a barrister and solicitor. This Act came into operation on the 1st of January, 1892. By the 10th section it is enacted that—

“No person shall be admitted to practise as a barrister or a solicitor solely, but every person admitted by the Supreme Court shall be admitted both as a barrister and solicitor.”

By the 11th section it is enacted, subject to existing rights of students-at-law, articled clerks, and judges' associates, that—

“No person not previously admitted as a barrister or solicitor in some part of Her Majesty's dominions in which the qualification of barristers and solicitors is in the opinion of the Supreme Court of equal value to that required by this section shall be admitted as a barrister and solicitor unless he be a natural born or naturalised British subject of the full age of twenty-one years of age, of good fame and character, and unless—

“1. He shall before being articled have passed the matriculation, or other examination required by the existing rules of the Supreme Court to be passed by clerks before being articled; and

“2. Shall also either before being articled, or after the expiration of such articles, pass the two annual examinations, including the subject of jurisprudence, required to be passed at the University of Melbourne by a person who has obtained the degree of bachelor of arts as a condition to his obtaining the degree of bachelor of laws, or such modification thereof as any rules of the Supreme Court may prescribe, and

“3. Shall also be articled to a barrister and solicitor for the term of three years, and shall have served the whole of such time either after passing or before passing the said two annual examinations, and

“4. Shall also pass the final examination required by the existing rules of the Supreme Court to be passed by clerks before being admitted to practise as solicitors, or such modification thereof as any rules of the Supreme Court may prescribe.”

The Court is required by these provisions to consider in the case of an application for admission by a person who has derived his qualification in some part of Her Majesty's dominions other than in Victoria, whether the qualification or all the qualifications, if there be more than one, of barristers and solicitors respectively in that part of Her Majesty's dominions, is, in the opinion of the Court, of equal value, substantially, to the new qualification required from all persons applying to be admitted in Victoria to practise as a barrister and solicitor. Each of these applicants is a solicitor of the Supreme Court of Judicature in Ireland, and each of them appears by the affidavits filed to have been admitted after service under articles, and after passing the preliminary examination and intermediate law examinations and the final examination prescribed under the authority of the Act 29 and 30 Vict. c. 25, intituled “An Act to Amend the Laws for the Regulation of the Profession of Attorneys and Solicitors in Ireland and to Assimilate Them to Those in England.” The standard of qualification thus prescribed is, generally speaking, of equal value, and, probably, in some respects, of even higher value, so far as they relate to the qualification of a practising solicitor, than that of Victoria; but the subjects of Roman

law, international law, constitutional law, and history and jurisprudence, which are essential parts of the Victorian course, are not to be found in the compulsory Irish course, nor any other subjects which would confer knowledge that would equally fit the candidate to practise both branches of the profession. It is stated that some of these subjects are usually included in the examination for the “Finlater Scholarship,” but this examination is not part of the qualification. It is an examination that is only open to a limited class of candidates who have obtained first places and gold medals at the four preceding examinations. This defect is, in our opinion, fatal, and it is impossible for us to hold that this particular qualification for attorneys and solicitors in Ireland is of equal value to the joint qualification for barristers and solicitors established in Victoria. But this is not the only difficulty that presents itself to granting these applications. Act 29 and 30 Vict., c. 84, provides several qualifications for admission, on terms, of solicitors in Ireland. Persons who have taken various degrees in universities in the United Kingdom (section 6), persons who have been called to the bar in Ireland (section 8), persons who have passed certain examinations in the faculty of law in the University of Dublin or in any of the Queen's Colleges (section 9), and persons who have been *bona fide* clerks of attorneys or solicitors for 10 years (section 10), may be admitted and enrolled as attorneys and solicitors in Ireland on certain terms. Each of these constitutes a distinct qualification, and it is necessary that we should be satisfied that each of them is of equal value to the Victorian qualification. It is not enough that the applicant should prove that he has obtained a qualification of the prescribed value, he must show that all the qualifications existing in the part of Her Majesty's dominions from which he comes are equal to the Victorian standard, and no means are provided by which we can form an opinion on that subject. We are unable upon the materials now brought before us by affidavit to form the opinion that the qualification of attorneys and solicitors in Ireland are of equal value to that required in Victoria by section 11 of the *Legal Profession Practice Act* 1891, and we are compelled, therefore, to refuse this application.

(Before Holroyd, J.)

RE KENNEDY, EX PARTE TATTERSON.

12th April.

Insolvency—Goods seized by the Sheriff under a *fi. fa.* are a security for the judgment debt, and the judgment creditor petitioning for the judgment debtor's insolvency must in his petition either offer to give up or value that security, although on the order being made absolute the security becomes valueless.

Petition in insolvency.

The facts sufficiently appear in the judgment.

Mr. Isaacs for the respondent took a preliminary objection.

Mr. Woolf for the petitioner.

Cur adv. vult.

HOLROYD, J.—The petition in this case alleged that Kennedy was indebted to the petitioner in the sum of £52 4s. 11d. by virtue of a judgment of the Supreme Court recovered against him by the petitioner on the 15th of February last; that the debt was wholly unsecured; and that Kennedy had committed acts of insolvency, one of them being that an execution issued against him on the said judgment had been levied by seizure, and that such process had not been *bond fide* satisfied by payment or otherwise within four days from the seizure. Mr. Isaacs for the respondent submitted, by way of preliminary objection to the validity of the order *nisi*, that when the petition was presented the petitioning creditor held a security for his debt over the goods seized by the sheriff, and that the petitioner ought in his petition either to have stated that he would be ready to give up his security for the benefit of the creditors after adjudication of sequestration or to have given an estimate of its value, which he had not done. The objection is not a technical one, but raises a point of considerable importance. A writ of *fi. fa.* when delivered to the sheriff to be executed, binds the goods of the debtor in general, subject to such title as may be acquired by any person *bond fide* and for value before actual seizure, and without notice of the delivery of the writ; but after seizure the specific goods seized are bound (*Supreme Court Act* 1890, ss. 174, 176). An execution creditor in England, who had obtained and served a garnishee order *nisi* under sections 61 and 62 of *The Common Law Procedure Act* 1854 before the bankruptcy of the debtor was held to have security for his debt within section 184 of the *English Bankruptcy Law Consolidation Act* of 1849 (*Holmes v. Sutton*, 5 El. and B. 65; and see *Hutton v. Cooper*, 6 Ex. 159). Similarly a garnishee order *nisi* after service, as well as a garnishee order absolute, obtained before bankruptcy has been held to constitute a security upon the property of the bankrupt within the 12th section of the *English Bankruptcy Act* of 1869, and also to be a charge on part of the bankrupt's estate within subsection 5 of section 16 of the same act (*Emanuel v. Bridger*, L.R. 9 Q.B. 286; *Lowe v. Blakemore*, L.R. 10 Q.B. 485; and see *Watson v. Morrow*, 6 V.L.R. (L.) 136). The reason for determining the garnishee order to be a security rested upon its resemblance to the seizure of goods by a sheriff under a writ of execution; and it seems never to have been for a moment questioned that goods which had actually been seized under a writ of *fi. fa.* fell within the compass of the word security, apart from any special definition of that word. Subsection 5 of section 67 of the *Insolvency Act* 1890 is an exact copy of subsection 5 of section 16 of the *English Bankruptcy Act* of 1869, and runs thus—"A secured creditor shall in this act mean any creditor holding any mortgage, charge, or lien on the insolvent estate, or any part thereof, as security for a debt due to him." There is nothing in the *Insolvency Act* which expressly limits the meaning of the word security to such securities as continue to exist after

an order *nisi* for sequestration has been signed, or after the order *nisi* has been made absolute. It is however, in the 76th section provided that the sheriff must not sell any property under any process for the sum of £50 or upwards until after eight days from the seizure; and if the property is sold, he is to retain the proceeds for four days after the sale, and if a sequestration of the debtor's estate takes place within that time the sheriff is to hand over the proceeds to the assignee or trustee. By the same section the further execution of any judgment or process against the property of an insolvent is directed to be stayed after an order of sequestration of his estate has been made but the person having right to such judgment may prove his debt against the insolvent estate, and where any property has been seized by legal process and not sold, such property is to be placed under sequestration in the same manner as any other part of the insolvent estate. Section 77 enacts that no action shall be brought against an insolvent for a debt provable in insolvency, and all proceedings in an action then pending shall, upon an order of sequestration being made, be stayed, and the plaintiff in the action may prove his debt, together with the taxed costs of it then incurred against the insolvent estate; but any creditor who shall be prevented by the sequestration of the debtor's estate from proceeding to sell under an execution levied before the order of sequestration was made shall be entitled to be paid his taxed costs incurred in the action under which such execution issued, and not exceeding £50, out of the proceeds of the insolvent estate. It seems from these enactments pretty clear that as soon as an order *nisi* for sequestration has been signed the creditor's security over goods seized under a *fi. fa.* is temporarily suspended; and if the order *nisi* is affirmed his security is gone. Such costs as he is to get in that event are to be paid out of the proceeds of the insolvent estate generally, and not out of the proceeds of the particular goods seized. If the order *nisi* is subsequently discharged I apprehend that the security revives in its full vigour. It has been argued that it would be impossible for the petitioner to estimate the value of his security when at the time of presenting the petition it may be worth a large sum, but may vanish on the order being made absolute; and that it is ridiculous to ask the petitioner to give up for the benefit of the creditors after the debtor's estate is adjudged to be sequestrated something which by the very fact of adjudication will become absolutely vested in the assignee or trustee. That is certainly a very forcible argument; for, when the law compels a man to do a thing, or rather does it for him, it seems rather superfluous to ask him to express his readiness to do it. Nevertheless the fact remains that the petitioning creditor's debt was secured at the time when the petition was presented, and that if I discharge this order *nisi* it will continue to be secured. Though it might have been superfluous, yet it was not impossible for the creditor to express his readiness to give up his security after adjudication, which was all that could have been required of him. Its value he was permitted, but not bound, to estimate. The solution of the difficulty pro-

bably is that the case of an execution creditor attempting, after the sheriff had levied on the property of his debtor, to sequester the debtor's estate because process had not been wholly satisfied by the seizure was never contemplated by the Legislature. The petition does not set forth whether the goods seized were sufficient to satisfy any portion of the debt, which in the whole, including interest, barely exceeded the statutory minimum. With some hesitation I give effect to the preliminary objection, and discharge the order *nisi* with costs.

Solicitor for petitioner, *Herald*.

Solicitors for respondent *Crisp, Lewis and Hedderwick*.

IN CHAMBERS.

(Before Holroyd, J.)

FEDERAL BANK OF AUSTRALIA V. BYRNE.

29th March, 2nd May.

Rules of Supreme Court 1884, Order III., Rule 6—

Order XIV. r. 1—Specially endorsed writ—Banker's overdraft—Particulars—Interest—In an action by a banker to recover the amount of an overdraft with interest, the particulars should state when the account commenced the rate of interest charged and the manner in which it is calculated, whether on daily balance or otherwise and whether half-yearly or other rests—Where a claim is made for interest from the date of the writ until judgment, the particulars should show whether the claim is demanded by way of damages or pursuant to a contract.

Application on behalf of the plaintiff under Order XIV. r. 1 for leave to sign final judgment.

The writ was endorsed as follows :—

The plaintiffs' claim is for money payable by the defendant to the plaintiffs; and for money lent by the plaintiffs as bankers to the defendant; and for money paid by the plaintiffs for the defendant at his request and to his use; and for interest upon money due from the defendant to the plaintiffs and forborne at interest by the plaintiffs to the defendant at his request; and for money found to be due from the defendant to the plaintiffs on accounts stated between them. The plaintiffs claim £21,870 13s. 6d.

PARTICULARS.

	£.	s.	d.
1892			
Feb. 29th. Principal due upon the defendant's overdrawn banking account with the plaintiffs	21,265	3	9
Interest on same	605	9	9
Amount due	£21,870	13	9

And the plaintiffs also claim interest on £21,265 3s. 9d. of the above sum at the rate of £8 per centum per annum from the date hereof to the day of signing judgment.

Mr. Cook to oppose.—There are several objections to this writ. No dates are given as to when the money was lent; or when money was paid at the request of the defendant. No dates are given from which the interest claimed is calculated nor the rate of interest charged. No dates are given as to when the accounts were stated between the parties. No dates are given in the particulars except the 29th February 1892, which is the date of the writ. As regards the

interest claimed it should have been alleged whether the same was claimed under a contract express or implied. The claim for interest from the date of the writ is manifestly a claim under Sec. 224 of the *Supreme Court Act 1890*, and therefore is in the nature of damages. *Coane v. Thomas Bent Land Co.* 12 A.L.T. 182. A defendant is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist. *Walker v. Hicks*, 3 Q.B.D. 8; *Parpaite v. Dickinson*, 38 L.T. (N.S.) 178; 26 W.R. 479; *Perry v. Flint*, 9 A.L.T. 99; *Windsor Coffee Palace v. Cheel*, 10 A.L.T. 275.

Mr. Higgins in support.—The objections raised, if they were to be successful, meant the endorsement of the whole of the entries in the ledgers of the bank. The defendant has his pass book and is perfectly well aware of the nature of the claim. The particulars given are sufficient. *Aston v. Hurwitz*, 41 L.T. (N.S.) 521.

HIS HONOR said.—I will consider the matter.

HIS HONOR, on a subsequent day, said :—An application was made to me in this case on behalf of the plaintiffs for liberty to sign final judgment for the amount endorsed on the writ of summons with interest and costs. The question to be determined was whether the particulars in the endorsement on the writ of summons were sufficient to constitute the writ a specially endorsed writ within the meaning of the rules. The particulars were as follows [His Honor read the particulars]. Beneath the particulars was set out a further claim for interest as follows [His Honor read the further claim]. The date of the writ is the 29th February of this year. Several English cases were cited to me, and, if I followed the principle laid down in those cases, viz : that the defendant must be furnished with particulars sufficient to enable him to judge whether he ought to pay the amount demanded, I think I should be obliged to determine that the plaintiffs should have furnished the defendant with the whole of his bank account from the beginning to the end; but that I think cannot have been the intention of the rules. This, however, I think should have been done at the least. I think the period at which the account commenced should have been stated in the particulars, and also the rate at which interest was charged and the manner in which it was calculated, whether on daily balances or otherwise, and whether with half-yearly or other rests. I also think it should have been made to appear whether the interest in the subjoined claim was demanded by way of damages or pursuant to the contract stated in the endorsement. I must therefore hold that the writ is not specially endorsed, and dismiss the summons with £3 3s. costs. I certify for counsel.

Solicitors—For plaintiffs, *Casey & O'Halloran*; for defendant, *Fergie*.

(Before Williams J.)

BENNETTS V. BENNETTS.

5th, 6th April.

Marriage Act 1890 (No. 1166) sec. 111—Applications

under sec. 111, of Act No. 1166 can be heard by a Judge in Chambers.

Application on behalf of the petitioner in a suit for dissolution of marriage for the payment of money by the respondent to enable her proctor to investigate the merits of her case under the provisions of section 111, of the *Marriage Act* 1890.

HIS HONOR.—Should not this application be made to the Court?

Mr. Moule as *amicus curiæ*. Applications of this nature have always been made upon summons and no objection was taken until the other day when Holroyd J. in the case of *Otway v. Otway*, (unreported) considered the objection a good one but by consent allowed the application to be heard before him sitting as a Court.

HIS HONOR said :—There seems to be a great doubt as to this point and I will adjourn the matter for the purpose of consulting with the other judges.

HIS HONOR on the next day said :—I have consulted two of my brother judges as to this point and we think it is not free from difficulty having regard to the interpretation section of this act read with section 111, under which this application is made. Having reference however to ss. 122 and 123 we think, with some doubt, that the former practice may be adhered to, and that the application can be heard by a Judge in Chambers. There is a double doubt, viz : whether the application should not be made to the Court, and also whether it should not be made to the Judge sitting in divorce proceedings, we prefer to follow the practice which has hitherto prevailed and I will therefore hear the application in Chambers.

Proctors for petitioner, *Cleverdon, Westley and Dale*; Respondent in person.

(Before Williams J.)

NEW ORIENTAL BANKING CORPORATION v. PETT.

12th April.

Rules of Supreme Court 1884 Order III r. 6, Order XIV. r. 1—*Specially endorsed writ—Overdrawn account—Interest.*

In an action by a banker to recover the amount of an overdraft with interest the endorsement should show how the claim for interest arises, whether by contract or otherwise, and how the rate of interest is arrived at.

Application on behalf of the plaintiff under order XIV. r. 1, for leave to sign final judgment.

The writ was endorsed as follows :—

The plaintiffs' claim is for the defendant's overdrawn account with the plaintiffs and interest thereon.

PARTICULARS.

Overdraft	...	£2,825	7	8
Interest thereon from 30th September 1891 to date at 9% per annum	...	141	4	8
		£2966	12	4

Mr. Moule to oppose.—The writ is not specially endorsed. It contains a claim for interest at 9 per

cent and there is nothing to show that it arises out of any agreement express or implied. There is nothing to show that 9 per cent. is the usual rate and no information is furnished on which your Honor can act. The endorsement should show how and upon what contract the claim for interest is based. He cited *Coane v. Thomas Bent Land Company*, 12 A.L.T. 182, 17, V.L.R. 198.

It was contended on behalf of the plaintiffs that upon an overdrawn account there is always an implied contract to pay interest. In a case of *Waite v. Power*, referred to in the Annual Practice 1892, pg. 202 where the claim was partly for money lent with interest thereon, the Court held that the claim for interest, though no express agreement therefor was alleged did not prevent the writ from being specially endorsed.

HIS HONOR said.—There is nothing to show how this claim for interest arises, and there is no allegation whether there was any contract to pay interest at 9 per cent., or at any other rate and I therefore think it cannot be claimed on a writ specially endorsed. I dismiss the summons with £3 3s. costs, I certify for counsel.

Solicitors for plaintiff *Attenborough, Nunn & Smith*; for defendant *Grant & Son*.

(Before Hood J.)

GRAY V. AUSTRALIAN DEPOSIT & MORTGAGE BANK LIMITED.

12th, 13th April.

Voluntary Liquidation Act 1891 (No. 1220) ss. 3, 4—*Company—Judgment—Voluntary Liquidation—Stay of execution—It is the duty of the Court to see that the creditors of a company in liquidation share equally, and one creditor will not be allowed to seize the assets and obtain an advantage over the others, except under very exceptional circumstances—Act No. 1220 was passed with a view of protecting companies and of preventing a creditor, in most cases, from pushing his judgment to the bitter end, and of saving companies from being rushed into compulsory liquidation.*

Application on behalf of the defendant Bank for a stay of execution on a judgment entered by the plaintiff under Order XIV., r. 1, on the ground that the defendant Bank was in voluntary liquidation.

Mr. Mitchell in support.

Mr. Weigall to oppose.

HIS HONOR said :—I will consider the matter.

HIS HONOR on the following day read the following judgment :—The plaintiff in this case applied under order XIV. for judgment. The only opposition offered was by an objection that there was no statement that an appearance had been entered. There was, however, produced a certificate of appearance under order XII., rule 8, and I overruled the objection, following *Doughty v. Counsel* (13 A.L.T., 180), and entered judgment for the plaintiff. An application was then

made by the defendants (founded upon a summons taken out some days before) that execution on this judgment should be stayed, on the ground that the defendant company is in voluntary liquidation. It is clear that under the *Companies Act* 1890 it is the duty of the Court to see that the creditors of a company in liquidation share equally, and one creditor will not be allowed to seize the assets and obtain an advantage over the others, except under very exceptional circumstances. This general rule was not disputed on behalf of the plaintiff in this case, but it was contended that I ought not to exercise the power of the Court in this particular instance, because it was said that the Legislature had, by passing Act No. 1,220, evinced an intention of altering the previous practice. I cannot, however, discover in that statute any trace of such an intention, but, on the contrary, I think it tells strongly the other way. Act No. 1,220 (*Voluntary Liquidation Act* 1891) seems to me to have been passed solely with a view of protecting companies by limiting the powers of this Court in making winding up orders. It thereby prevents a creditor, in most cases, from pushing his judgment to the bitter end, and the object plainly is to save companies from being rushed into a compulsory winding-up. Comments were made on the policy of this act, but with that I have nothing to do. I think that the intention of the Legislature is clear, and it is my duty to give effect to it. If I were to allow a creditor to issue execution and seize the assets, the purpose of a voluntary winding up would be practically defeated, and I should, to a great extent render nugatory the protection given to companies by this act. In my opinion, therefore, this argument affords no answer to this application. It was, however, further urged for the plaintiff that the affidavit made in support of this application is defective, and on this point I have felt some difficulty. The affidavit is certainly very meagre. Nearly every thing is left to inference. There is no distinct statement that this company is registered under the *Companies Act*, nor that it is in liquidation, nor that it is unable to pay its debts, nor that the winding-up resolutions have been properly carried in accordance with the requirements of the act. But the defendants are sued and described as a limited company. The deponent swears that he is the duly-appointed liquidator, and that at a duly-convened meeting an extraordinary resolution had been duly passed, stating that it was advisable to wind up, as it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business. Bare, therefore, as this affidavit appears, I think that there is sufficient in it to justify me in inferring the necessary facts, especially as there is no contradiction and no real dispute as to their existence. I will accordingly make an order staying all further proceedings on this judgment, the plaintiff to have liberty to prove in the winding-up for debt and costs of suit, and for the costs of this application, which I fix at three guineas, and I certify for counsel.

Solicitors, for plaintiff, *Gillman and Mussen*; for defendants, *Davies, Campbell and Davies*

(Before Williams, J.)

BANK OF VICTORIA v. PERRIN.

28th, 29th April.

Rules of Supreme Court 1884, Order III. r. 6, Order XIV. r. 1, Order XIX. rr. 4, 11—Specially endorsed writ—Interest—Signature by firm—delivery—where a guarantee provides for payment of the usual rate of interest, the holder of the guarantee may specially endorse his writ for the principal amount and interest at the usual rate—a specially endorsed writ need not have the word "delivered" nor the date of delivery on it—a specially endorsed writ may be signed in the name of a firm of solicitors.

Application on behalf of the plaintiff under Order XIV. r. 1 for leave to sign final judgment.

The writ was endorsed as follows:—

The plaintiff's claim is against the defendant as surety for £12,919 16s. 3d. for principal moneys lent and advanced by the plaintiff bank to the City of Richmond Coffee Palace Coy. Limited, by way of overdraft with interest thereon on the joint and several guarantee of the said defendant and others dated the 30th July 1888.

Particulars.

Dec. 31st to amount of overdraft at this date	£12845	8	7
1892			
April 8th interest thereon at 8% per annum ...	274	7	8
	£12919	16	3

Signed, Moule and Seddon.

The affidavit in support of the application exhibited the guarantee on which the defendant was sued. By this guarantee the defendant undertook to pay the amount of the overdraft upon notice given by the bank with interest thereon at the usual rate. The affidavit stated that the sum claimed was justly due and owing. The defendant's affidavit did not deny the debt, but stated that several sums had been paid in by the liquidator of the Coffee Palace Coy. and set out a notice to pay given by plaintiff to the defendant in September 1891, in which the principal sum of £12,166 13s. 6d. was claimed with interest at the rate of 8 per cent. His Honor directed that the plaintiff should file an additional affidavit stating what was the usual rate of interest and what was the principal sum now due under the guarantee and whether any sums had been paid into the account by the liquidator of the Coffee Palace.

An affidavit was accordingly filed stating that 8 per cent. was the rate of interest agreed upon and was the usual rate; that the principal sum due was £12,154 1s. 4d., and that no moneys had been paid into this account by the liquidator. It was not stated on the writ that it had been delivered and did not state the date of delivery, but there was an endorsement of the date of service in the usual form.

Mr. Moule in support.

Mr. Weigall to oppose. There are several preliminary objections. There is a claim for interest and such claim is not the subject of special endorsement. *Coane v. Thomas Bent Land Co.* 12 A.L.J. 182. There is nothing

to show that the plaintiff is entitled to interest at the rate of 8 per cent. The writ does not show the date of delivery as required by Order XIX. r. 11. Your Honor recently decided in *Harris v. Moore* (unreported) that this was a fatal objection. The writ also is signed in the name of a firm and should be signed by a solicitor and not by a firm Order XIX. r. 4.

Mr. Moule.—The interest is claimed under a guarantee which provides that interest at the usual rate may be charged. It clearly arises out of an express agreement and the amount is merely a matter of proof. A specially endorsed writ need not have the word *delivered* nor the date of delivery at the end of the claim. *Veale v. Automatic Boiler and Feeder Co.* 18 Q.B.D. 631. The writ is in accordance with the form given in App. A. It would be impossible to endorse the date of delivery upon these writs. Order XIX. r. 4 does not apply to specially endorsed writs and such writs may be signed in the name of a firm.

HIS HONOR said:—I think that in this case interest is properly claimed and is payable. The guarantee provides for it. I gave a decision yesterday in *Harris v. Moore* in which I held that a specially endorsed writ should show the date on which it was delivered. In other words that Order XIX. r. 11 applied. I was not referred to the case of *Veale v. Automatic Boiler and Feeder Co.* 18 Q.B.D. 631, and I now think my previous decision was clearly wrong. Hawkins, J., in that case says "the special endorsement on the writ is in place of a statement of claim and, although it is practically the form to be used where separate statements of claim are made, I do not think it essential that the word *delivered* should be on the back of the writ. I cannot see any object in having it there. No doubt the date of the issue of the writ should be stated on it before service, but a man knows when a writ is served on him, and if it were necessary to state the date of service before serving it the process server would have to carry pen and ink and insert the date at the time of effecting service; he might as well be required to fill up on the spot the memorandum of service. Moreover one does not speak of delivering a specially endorsed writ but of serving it. The objection is without substance and we would be yielding to a technicality if we allowed it." I do not hesitate to say that we have carried technical objections in respect of special endorsements as far as we should go, and I am not disposed to carry them any further. Then it is said that the writ is not signed by the solicitor. It is signed by "Moule and Seddon," and I think that is sufficient unless we give way again to technicalities. As to the merits, it appears that there is the sum of £12,154 1s. 4d. due as principal and the guarantee provides for interest at 8 per cent. The affidavits filed in answer to the application simply say that the defendant has a claim against some co-guarantors. I think therefore the plaintiff is entitled to judgment for the sum of £12,154 1s. 4d. with interest at the rate of 8 per cent. from the 21st September 1891, when notice was given up to the present. I allow the application with costs.

Solicitors, for plaintiff, *Moule and Seddon*; for defendant, *Westley and Demaine*.

SUPREME COURT SITTINGS.

Before Holroyd, J.

BYRCHALL V. THE QUEEN.

4th Feb., 12th April.

Public Service Act, 1890, secs. 2, 6, 121, 123, 124, 129—*A public servant appointed under Act No. 160, may be dismissed by the Public Service Board, as constituted by the Public Service Act 1890—Section 2 of this Act does not preserve rights previously acquired but which have not become operative, and therefore the words "any officer" in section 124 signify any officer whenever and however appointed.*

This was a petition under the *Crown Remedies and Liability Act 1890*.

The facts sufficiently appear in the judgment.

Mr. Hayball for the petitioner. The petitioner relies on sections 32, 35 and 27 of the Act No. 160. He was tried by two members of the Public Service Board, instead of by three members of a special board. On this point *Browne v. The Queen*, 12 V.L.R. 397, which was decided in section 35 of Act No. 160 is conclusive. The Public Service Board have no jurisdiction to hear charges against an officer appointed under Act No. 160, and if they have no power under section 5 of the *Public Service Act 1890*, then section 6 giving power to two members only also goes by the board.

Dr. Madden for the Crown. The decision in *Browne v. The Queen* is erroneous, and the whole of the officers in the public service are subject to the *Public Service Act 1890*. The petitioner in that case was simply got rid of; it was never suggested that he was guilty of any misconduct. The *Public Service Act* of 1889 contained a clause which is carried out in section 2 of the *Public Service Act 1890* by which the rights and privileges of officers classified under Act 160 were altered. Section 129 of the Act of 1890 runs—"If any officer is guilty of any misconduct, etc." This is a general enactment and refers to and includes every officer in the public service. Even supposing that a specially appointed Board might have dealt with the petitioners case that does not preclude the Public Service Board from dealing with it, but merely makes the petitioner liable to be dealt with by two boards. In *Browne v. The Queen* the subject of misconduct was never introduced into the case, if it had the decision would have been different, therefore Brown's case, does not apply. Then there has been public legislation since Brown's case, viz., section 29 of the *Public Service Act* of 1889 re-enacted in section 123 of the *Public Service Act 1890* also section 124 of the latter Act under which the Board proceeded in this case. This legislation brings all officers in the service within the cognisance of section 124. The other point that two members only of the board adjudicated in the matter is cured by section 6 of the *Public Service Act 1890*.

Mr. Hayball in reply. Section 123 of the *Public Service Act 1890* does not make the petitioner subject to the Public Service Board because he is not charged with any breach of any regulations. [Holroyd, J.:—

Was there any section in any previous Act similar to section 29 of the *Public Service Act* of 1887 reproduced in section 123 of the *Public Service Act* 1890? Is it a fact that there was no similar section in the *Public Service Act* 1883? *Browne v. The Queen* was decided with reference to the 76th and other sections of the *Public Service Act* 1883.] There are some general provisions in the Act of 1883 dealing with the same subject matter. Only in the event of a breach of the relations would the petitioner be subject to the Public Service Board. In Brown's case the former part of the section was construed very strictly. And I submit therefore that the latter part should also be construed strictly.

Cur ad vult.

HOLROYD, J.—A petition under the *Crown Remedies and Liability Act* 1890. When the *Public Service Act* 1883 was passed the suppliant Byrchall was a civil servant within the meaning of the third schedule of the Act 25 Vict., No. 160. He was at that time a permanent officer performing clerical duties in the savings bank branch of the Post-office and Telegraph department. Subsequently he became a senior paying teller in the savings branch of the General Post office, Melbourne, and was so employed at a salary of £220 per annum on the 3rd of September, 1890. On that day he was suspended by the permanent head of the department. He was accused of carelessness in the discharge of his duties in failing to account for a sum of £130 on the 1st of September, 1890, and also of improper conduct in contracting debts for which judgments were subsequently obtained against him. An enquiry into the truth of these charges was afterwards held by two members of the Public Service Board, acting as the Board, who found the charges proved; and thereupon the Board so constituted dismissed the suppliant from the service with the consent and concurrence of the Governor-in-Council. Since his suspension the suppliant has continued able and willing to perform his duties, but has been prevented from doing so by the savings bank authorities. No salary has been paid to him since the 31st of August, 1890. His petition is dated the 7th of August, 1891. In the foregoing statement of facts I have incorporated the admissions made on behalf of Her Majesty on notice to admit, and also by counsel in open Court. The suppliant submits that his dismissal was wrongful and illegal, and claims the amount of his salary (£205 16s. 2d.) from the 1st of September, 1890, to the date of the petition, and to be reinstated in his former office without prejudice to any of his rights and privileges; or, in the alternative, damages for the alleged wrongful dismissal. One of his objections to the legality of his dismissal was that he only received notice of it by a letter from Mr. Smibert, the Deputy Postmaster-General, and that he should have been served with a copy of an Order-in-Council bearing the seal of the colony; but this objection was abandoned by his counsel at the hearing. His real complaint was that he had been tried and dismissed under the 76th and 82nd sections of the *Public Service Act* 1883, repealed and re-enacted by the *Public Service Act* 1890 (see sections 121 and 129), and under section 4 of the

Public Service Act 1889, also repealed and re-enacted by the *Public Service Act* 1890 (see section 6), which provides that any two members of the Public Service Board shall have power to perform any of the duties of the Board, instead of under the 32nd and 35th sections of the Act passed to regulate the Civil Service in 1862, 25 Vict., No. 160. The inquiry into the truth of the charges brought against him should, as he contends, have been conducted by a Board of three persons—specially appointed by the Governor-in-Council for that purpose. The suppliant relied upon the case of *Browne v. The Queen*, in which it was decided by the Full Court that a person who at the time of the passing of the *Public Service Act* 1883 was subject to the provisions of the Act No. 160 was not affected by the 76th and 82nd sections of the *Public Service Act* 1883; all his legal rights and privileges under the Act No. 160 having been expressly preserved and saved by the later act, and that his contract of service was one of those rights. Dr. Madden, for the Crown, intimated, with the view, I suppose, of avoiding any possible misunderstanding in the event of an appeal, that he challenged the decision of the Court in *Browne v. The Queen*, which was not unanimous; but as to this it is sufficient for me to say that I adhere to the opinion which, as a member of the majority of the Court, I then entertained. The learned counsel, however, attempted to draw a distinction between the present case and Brown's. Browne was dismissed from his post in consequence of a calamity which had befallen him, and which was found to incapacitate him for the discharge of his duties. Byrchall was dismissed for alleged indiscretions or delinquencies. Apart from subsequent legislation I fail to perceive what difference the distinction can make. Brown invoked the aid of the Court, as Byrchall has done, because, as he asserted, the charges brought against him had been investigated by the wrong tribunal, a tribunal which had no jurisdiction in the matter; and it was on this ground, and not upon any consideration of the nature of the offence or unfitness imputed to him, that the Court pronounced in his favour. Another point, however, was raised upon the construction of sections 29 and 30 of the subsequent act of 1889, which appear in the consolidated statutes as sections 123 and 124 of the *Public Service Act* 1890. By section 29 the board, i.e., the Public Service Board, is authorised to make regulations concerning the duties to be performed by officers in the public service, whether appointed before or after the passing of the act of 1883, and the discipline to be observed in the performance of such duties. By section 30 it is provided that if *any officer* be guilty of any breach of the regulations, or if he be guilty of any misconduct, or be negligent or careless in the discharge of his duties . . . or be guilty of any disgraceful or improper conduct, such officer is to be deemed guilty of an offence. The permanent head of the department, if he thinks the offence sufficiently serious to report, may report the officer offending to the Minister; the Minister may, if he thinks fit, lay the matter before the board; and, unless the charges are admitted in writing, the board is to inquire into

their truth, and finding them proved may, with the consent of the Governor-in-Council, dismiss the officer. In this way, it was said, and in no other, the suppliant Byrchall was treated. The only regulations put in evidence were regulations made under section 123 of the *Public Service Act* 1890. Amongst them I have been unable to discover any regulation touching the offences of which the suppliant was accused, nor was any such regulation pointed out to me; but, inasmuch as the suppliant had been accused of carelessness in the discharge of his duties, and of improper conduct, and in the 30th section of the Act of 1889 these offences are coupled with breaches of the regulations, and directed to be dealt with in the same manner, it was argued very forcibly that he was as much amenable to the jurisdiction of the board as if he had committed a breach of the regulations, and consequently that he had, with the consent of the Governor-in-Council, been properly dismissed. My attention was also called to the exception in the proviso which preserves previously-acquired rights in the second section of the Consolidation Act of 1890. The repeal of the *Public Service Acts* of 1883 and 1889 is not to affect anything done under the Act No. 160, "or any privileges or rights existing at the commencement of the *Public Service Act* 1883, or thereafter accruing of or to any person then subject to the provisions of the said Act No. 160, save in so far as such rights or privileges may have been altered or taken away by any Act amending the *Public Service Act* 1883." That is only the language of a draftsman cautious while engaged in the task of consolidation not to prejudice questions which might arise but which had not been determined under the enactments consolidated. But it is to be particularly noticed that the Act of 1889, although it contains a saving clause—section 2—does not preserve rights previously acquired which have not become operative, and there is nothing in it which limits the generality of the words "any officer" in the 30th section. Uncontrolled, those words are wide enough to signify any officer, whenever and however appointed, and as they must have that meaning in relation to the breaches of the regulations, why should they not have it in relation to any other offence enumerated in the section? I think the argument for the Crown must prevail, and I must dismiss the petition.

Solicitor for petitioner, *Marshall Lyle*.

Solicitor for the Crown, *Crown Solicitor*.

Before a'Beckett, J.

GREGORY v. POOLE AND ANOTHER.

11, 25 April.

Statute of Limitations.—The entry of an administrator on land of his intestate prevents the Statute of Limitations beginning to run against the infant heir. The mere fact that the infant did not take possession, and that the land was unoccupied during her lifetime makes no difference.

This was an action for the recovery of land and for mesne profits.

The facts as disclosed by the evidence were as

follow:—Thomas Gregory, in 1854, came from England to Victoria, leaving in England a mother, father, and elder brother, George Gregory, the present plaintiff. Thomas Gregory, in 1856, married Eleanor Howe, and by her had two children Emma and a younger child. He bought the land in question in 1858. On the 9th November 1859, he and his younger child left French Island in a boat for the mainland and were never heard of again. His father-in-law took out a rule to administer the goods of Thomas Gregory and disposed of the land to one Ward who about 1875 sold what right he had to it to the defendant George Poole. Emma died in 1866, Thomas Gregory's mother in 1864, and his father in 1882. George Gregory now sued as heir-at-law of Thomas and of Emma for the recovery of the land and for mesne profits. The other defendant, John Saunders, was merely in possession of the land as servant of George Poole.

Mr. Higgins and *Mr. Vasey* for the plaintiff.

Mr. Madden and *Mr. Power* for the defendant.

Cur. adv. vult.

A'BECKETT, J.—In this case the only fact which admitted of doubt upon the evidence was the date of the death of Thomas Gregory, from whom the plaintiff claims title by descent. I accept 9th November 1859 as the true date. It was fixed as the date of death at a time when no one had an interest in misrepresenting the date, and when calculations could be made by which it could be correctly ascertained. One of the witnesses, Mrs. Bates, swears that this was the day, and though she cannot now explain the reasons which led her to arrive at it, I accept her statement on the subject. On this finding of fact I have to deal with the defence that the plaintiff's title is barred by the *Statute of Limitations*. On the death of Thomas Gregory, intestate, the land the subject of this action descended to his infant child Emma Gregory, who died on the 14th of May 1886. It does not appear that any stranger entered on the land in her lifetime. If the administrator of her father had entered I think he should be regarded as having done so as her trustee so as not to set the Statute of Limitations running against her. See *Foley v. Egan*, 17 V.L.R. 340. The mere fact that the infant did not take possession and that the land was unoccupied during her lifetime would not set the statute running. See Act No. 873 section 1, now part of section 19 of Act No. 1136; and independently of this provision, *Trustees &c. Co. v. Short* 13 Ap. Ca. 793. I therefore think that the statute began to run against the plaintiff only from the date of her death under section 19 of Act No. 1136. This was in 1866; but the plaintiff was entitled to the protection of section 31 being under the disability of absence from Victoria allowed for under that section. This disability has never been removed, but notwithstanding his disability he would under section 32 lose his right unless he brought his action within 30 years from the right accruing. He is well within that time if he claims the estate of Emma Gregory. If he is to be regarded as claiming the estate not of Emma but of Thomas Gregory, the

last purchaser, he is only just within time. He would be excluded if time had begun to run against Emma and he regarded as claiming under her, were a succession of disabilities not being allowed for. The plaintiff sues for mesne profits and evidence has been given on both sides as to annual value. I allow £20 a year as the annual value. I direct that the plaintiff recover possession with £120 and costs to be paid by the defendant George Poole.

Solicitors for plaintiff *McCutcheon and Bruce*.

Solicitor for defendant *F. J. S. Stephen*.

(Before Holroyd J.)

RE CHRISTIE V. FOSTER BREWING CO.

25 March, 2 May.

Trade Marks Act 1890 s. 13—a corporation can be convicted of offences mentioned in this section—Goods manufactured to a customer's order, but neither delivered nor approved are "for sale" within the meaning of section 13 sub. sec. (2). An authority to prosecute which covers the offence set out in the information is sufficient, though, it does not exactly correspond with the information.

Order nisi to review a decision of Justices in Petty Sessions.

The facts sufficiently appear in the judgment.

Affidavits were filed by three of the Justices to the effect that the reasons for their decision were that they thought sec. 13 of the *Trade Marks Act 1890* did not apply to a corporation, that the goods in question were not in the possession of the defendant company for sale, and that the defendant acted innocently.

Mr. Isaacs for the defendant to show cause. There was abundant evidence that the goods seized, though in the possession of the defendant, were not in its possession for sale, but had already been sold. Sec. 13 of the *Trade Marks Act 1890* cannot apply to a corporation. Sub. sec. (6) of that section gives an option to the defendant which is personal and cannot be exercised by a corporation. Taking this section and section 43 of the *Justices Act 1890* together, this view is further borne out. Section 12 of the former Act which is an interpretation section and defines the word "person," must be read reasonably so as to promote and not to defeat the object of the Statute, *re the 4th South Melbourne Building Society* 9 V.L.R. (Eq.) 54. The company acted innocently, as they only affixed the labels supplied by Lange and Thoneman on bottles belonging to that firm. The authority given by the Commissioner of Customs is bad. It was given on the 21st January and only authorised a prosecution for an offence committed on that date, whereas the present prosecution was for an offence committed on the 23rd January.

Mr. C. A. Smyth for the informant to move the order absolute. Section 13 of the *Trade Marks Act 1890* does apply to corporations, *Starey v. Chilworth Gunpowder Co.* 24 Q.B.D. 90, *Reg. v. Panton ex parte Farmers' Produce Co.*, 14 V.L.R. 836. The only reason given by the justices in announcing their

decision was that the defendants acted innocently. That is not denied in any of the affidavits filed by the justices, and must be taken to be the real reason of their decision. It was for the defendant to show that it had acted innocently and there was no evidence upon which the justices could have reasonably found that it so acted. The authority given by the Commissioners of Customs is to do all acts necessary to the prosecution and was properly given before any other steps were taken towards the prosecution.

Cur. ad. vult.

HOLROYD, J.—This was on order nisi to review an order of the Court of Petty Sessions at Melbourne, dismissing an information laid by Christie against the defendant company for having on the 21st January, 1892, unlawfully had in its possession for sale 50 dozen bottles of beer, to which a false trade description was applied. It appears, from the affidavits of three of the four justices who heard the information, that they dismissed it on three grounds, firstly, that the section of the *Trade Marks Act, 1890*, under which the information was laid, did not apply to a company; secondly, that the goods in question were not in the possession of the defendant for sale; and thirdly, that the defendant acted innocently. In *Reg. v. Panton, ex parte Farmers' Produce Company Limited*, (14 V.L.R., 836) it was held by the Full Court that an incorporated company was liable to prosecution under the 59th section of *The Public Health Amendment Act, 1883*, for knowingly having in its possession for the purpose of sale unwholesome meat; my brother Williams doubting whether guilty knowledge could be imputed to a corporation. That decision is, for the present at least, binding, and from the tendency of recent legislation is, I think, not likely to be disturbed. We have in our *Interpretation Act* a clause which directs that in all statutes the words "person" shall include corporation, unless there is something in the subject or context repugnant to that construction. By section 12 of the *Trade Marks Act 1890*, copied from section 3 of the English Statute, 50 and 51 Vict., c. 28, the words "persons," "manufacturer, dealer, or trader" and "proprietor" are expressly declared to include for the purpose of part II. of that Act, which deals specially with offences created in relation to trade-marks and trade descriptions, any body of persons corporate or unincorporate. The declaration is absolute. There is no exception, even of the case in which the subject or context may appear repugnant to such a construction. In the English statute "person" is defined, and not "persons;" and the word "persons" in section 12 is almost certainly a misprint. It cannot reasonably be suggested that by the definition of "persons" in the plural it might have been intended to limit the meaning of "person" in the singular, because, while "person" occurs repeatedly in part II., "persons" will be found in only two other places, where any definition of the word could not possibly be required. Adopting the common rule of interpretation, also embodied in our *Interpretation Act*, that

the plural number includes the singular, there has been introduced into part II. of this particular Statute not merely a repetition of the general enactment concerning the meaning of "person or persons" as ordinarily embracing corporations, but an enlargement of it unqualified by any reference to context or subject. Lord Selbourne, on one occasion in the House of Lords, observed that statutes, like other documents, are constantly conceived according to the popular use of language, and that in its popular sense "person" did not extend to a person in law. "That accounts," he went on to say, "for the frequent occurrence in some statutes in interpretation clauses of an express declaration that the word 'person' shall extend to a body politic or corporate." At that time there did not, and as far as I am aware does not now, exist in England a general enactment like our own, interpreting the word in the same way in all statutes unless restricted by the subject or context. His lordship's language shows clearly the importance to be attached to such a declaration, whether applied to all statutes or to any statute in particular. How much greater weight, then, should be attributed to the declaration when the restrictive qualification is withdrawn. The object of the 59th and other sections of the *Public Health Amendment Act 1883* was to prevent the consumption of unwholesome meat; and I thought that the acts which with that object had been prohibited and made offences under the law, such as selling unwholesome meat or exposing it or knowingly having it in possession for sale, were all of one class, and could be as easily committed by an incorporated company as by an individual; and, when committed by either, needed equally to be visited with punishment, that others might be deterred from the same offences. A corporation cannot act, any more than it can think, unless by its servants; and in all civil proceedings the acts of the servants entrusted with the management of its affairs and acting within the scope of their authority must, and in some criminal or quasi-criminal proceedings certainly may, be deemed the acts of the corporation, and their knowledge its knowledge. A proceeding against a corporation for having knowingly in its possession for sale meat not fit to be sold was in my opinion one of those proceedings I think the same of a proceeding against this incorporated brewing company for unlawfully having in its possession for sale goods to which a false trade description was applied. There is no difference in principle between the two cases. The only distinction is one as to proof. The person found with falsely described goods in his possession may excuse himself in various ways, and amongst others by proving that he acted innocently. The offence itself belongs to a class created by statute with the view of preventing goods from being palmed off as something which they are not. The offence of which the company was accused is punishable either by imprisonment with or without hard labour or by a fine. Every person charged with such an offence before a court of petty sessions has the option, if he chooses to exercise it, of being tried on indictment or presentment, and

on appearing before the Court is to be informed of his right to be so tried, and if he then exercises his option the justices are to deal with the charge as with others which may be prosecuted by indictment or presentment. It was put to me by counsel that a corporation could neither be imprisoned nor exercise the option given to the accused, which was personal; and, moreover, that it could not answer the questions which the 43rd section of the *Justices Act 1890* directs to be asked of the accused. These would be very weighty arguments if the Legislature had not indicated otherwisethan by the penalty and the mode of prosecution, by whom the offence may be committed. But once satisfy yourself from other sources that Parliament has within its purview as offenders corporations as well as individuals and the difficulty vanishes. Assume that corporations can offend, will any practical inconvenience have to be surmounted in the trial of such offenders, or in sentencing them if convicted, or will they be subjected to any injustice? As was pointed out in the case to which I have referred, corporations can undoubtedly be indicted and fined; and as to answering questions if they can know, think, and act by their servants, why should they not speak by them also? But, in truth, under the 43rd section of the *Justices Act*, and also under the 39th section, the same question would arise as has arisen as to the meaning of "person." They both commence "If any person, &c.," But to determine the meaning in those sections, only the aid of the *Interpretation Act* could be invoked. If they were plainly inapplicable to a corporation, then in those sections the word "person" would not include a corporation, because there would be something in the subject or context repugnant to such a construction. In the next place the magistrates were of opinion that the goods found in the company's possession were not for sale, but had been already sold to Lange and Thoneman. Mr. Talbot the secretary of the company, who was managing its business at the time of the seizure, has explained what the course of dealing was between the company and Lange and Thoneman. The beer which Lange and Thoneman had been in the habit of purchasing since August last was specially brewed by the company to their order. The labels were prepared by Lange and Thoneman and supplied by them to the company, and the company paid for as many as they used. The beer was bottled by the company, and the company's servants affixed the labels to the bottles and packed the bottles in cases which the company had had made, and stencilled upon the cases the letters Lange and Thoneman over M in a diamond, and also the words "Export Brauhaus Compagnie, Münchener Bier." The cases so marked were delivered to Lange and Thoneman, who paid full price for them, and the company paid Lange and Thoneman for the labels. In fact, Lange and Thoneman bought the beer, bottles, and cases; and the company bought the labels. No charge was made for stencilling. The bottles of beer which were seized were still in the brewery. They had been ordered by Lange and Thoneman and had the labels attached to them, but had not been packed in

their cases nor paid for. It did not appear whether the order for the goods was in writing nor what were its terms, but in the argument the validity of the contract of sale was tacitly assumed. Whether there had been a binding contract or not, the property in the goods had not passed to Lange and Thoneman at the time of the seizure. When a man contracts to sell to another an article which he has to manufacture, the vendor must appropriate the article when made, and the purchaser must assent to the appropriation before the property can pass to him. In my opinion the company had not by affixing the labels irrevocably appropriated the goods. If they had sold them to others, Lange and Thoneman could not have claimed them as theirs, and if in lieu of this lot they had supplied Lange and Thoneman with other similar beer similarly bottled and labelled, they could not have successfully sued for breach of contract. Even if there had been an appropriation on the part of the company, Lange and Thoneman had not assented to it. Then the pinch of the case is this, whether when goods have been manufactured to a customer's order but neither delivered nor approved, so that the property in the goods has not passed, the goods are for sale within the meaning of subsection 2 of section 13 of the *Trade Marks Act*, or whether the expression for sale means more than for sale generally, that is to any person who is ready and willing to pay the price demanded. The expression is not necessarily so limited and in my opinion is not so limited in the definition of the offence with which the company is charged. Strictly speaking, the falsely described beer was for sale. It was neither made nor bottled, nor kept for any other purpose, although intended to be sold to known persons, if they would accept it as according to order. The mischief is the same whether the manufacturer applies a false description to goods at the instance of a promised customer, to assist him in deceiving others, or whether he applies it, while awaiting customers, with the intent to deceive the first who may present himself. When there is a choice of interpretations it is the duty of the judge to adopt that one which will diminish the mischief by enlarging the remedy. *Boni judicis est ampliare jurisdictionem.* In the third place the justices were of opinion that the defendant had acted innocently. But, as appears from an affidavit filed on behalf of the company, the justices had selected a wrong standpoint. They were regarding the company, not as a body corporate, acting by its servants, but as an aggregate of responsible shareholders, all of them possibly, and most of them probably, innocent individually. I can discover no trace of innocence in the corporation. The label affixed to the bottles exhibited in conspicuous letters the inscription, "Export Brauhaus Compagnie, Münchener bier, beste qualität," signifying in English, "Export Brewery Company, Munich beer, best quality." It also bore a cross with "Handels-Zeichen," that is "Trade-mark," written beneath it, and the words "speziell für heisse klimате gebraut," that is "Specially brewed for hot climates." What would anyone who had learnt German, or who had the

inscription translated to him, understand the label to import, but that the beer had been brewed in Munich by a foreign company for exportation to a hot climate? Could anybody conceive from the general appearance of the label that the beer had been brewed in Victoria? Not only was the description false as to the country and place in which the goods were manufactured, but no one, who knew where they came from, could reasonably have imagined that it would not deceive, or that it had not been invented for that very purpose. Mr. Talbot, the then manager, must have been aware that Lange and Thoneman had ordered the beer to sell it again. It lay upon the corporation to prove its innocence, and no proof of innocence has been produced. The evidence, into which I need not further enter, all tends to the opposite conclusion. The proceedings before the court of petty sessions were instituted by the written direction of the Commissioner of Trade and Customs. Mr. Isaacs attacked the direction as insufficient, because it did not correspond with the information. The direction authorised Christie to prosecute the company for one of the offences enumerated in the 13th section of the *Trade Marks Act*, namely, unlawfully having in its possession for sale goods to which a false trade description was applied. It specified the goods as "cases containing bottles of beer," and the description as consisting of figures, words, and marks which were reasonably calculated to lead persons to believe that the beer was the manufacture of some person other than the person whose manufacture it really was, and as being false in a material respect as to the place or country in which the beer was made or produced; whereas the information specified the goods as "bottles of beer" only, and the description as labels to indicate that the beer was made or produced in Germany, and false in a material respect as to the place or country in which the beer was made or produced. If the information had been laid in the exact terms of the authority the evidence would have justified a conviction; but the information as laid was sufficient to sustain a conviction if proved. The specification in the authority was more ample than that in the information, but comprised it. The authority instead of being insufficient was more than sufficient. A prisoner may be found guilty of larceny under a presentment which charges him with stealing six sheets and five blankets, although he stole only three sheets. The order to review will be absolute with costs. The order dismissing the information must be set aside, and the case must be remitted to the justices for rehearing with an intimation of the opinion of the Court that the section of the *Trade Marks Act* 1890 under which the information was laid did apply to an incorporated company; that in law the goods in question were in the possession of the defendant for sale; and that there was no proof that the defendant had acted innocently; and further, that Christie's authority to institute the prosecution was sufficient. The costs of the first hearing must abide the result of the re-hearing.

Solicitor for complainant, *Crown Solicitor*.
Solicitors for defendant, *Parey, Wilson & Cohen*.

(Before Williams, J.)

CARROLL V. FORREST.

29 April.

Water Act 1890—Supreme Court Act 1891 s. 5. Where the affidavit in support of an order nisi stated that the cause was heard before two justices in Petty Sessions, although the Water Act makes rates recoverable before two justices simply, a judge has jurisdiction to entertain a motion to make that order absolute.—Municipal rate books are under secs. 338 and 339 of the Water Act 1890, evidence of the valuation therein contained—A regulation published in the Government Gazette which specified no date for the payment of the rate is insufficient proof of that rate being due.

Order nisi to review a decision of justices.

The Western Wimmera Irrigation and Water Supply Trust, by their duly authorised agent, James Carroll, at Horsham, sued the defendant, John Forrest, for water rates alleged to be due by him for the years 1890 and 1891. The justices made an order for £35 9s. The defendant obtained an order nisi to review this decision on the following grounds:—

1. That the magistrates were wrong in admitting in evidence on the hearing of the said complaint copies of the valuer's returns.

2. That the magistrates were wrong in admitting in evidence on the said hearing the rate book of the Shire of Arapiles for the year 1891.

3. That there was no evidence before the magistrates on the said hearing of the valuation of any of the lands specified in items 7 and 8 of the particulars annexed to the said complaint.

4. That there was no evidence before the magistrates on the said hearing that the defendant was the owner or occupier of any of the land in respect of which the rate sued for in the said complaint was assessed.

5. That there was no evidence before the magistrates on the said hearing of the time or times at which the rate for the year 1891 was made payable.

6. That there was evidence before the magistrates on the said hearing that the district of the Western Wimmera Irrigation and Water Supply Trust was divided under Section 336 of the *Water Act 1891*, but there was no evidence before the magistrates showing in which division the said lands were situate.

7. That the magistrates were wrong in holding that the defendant was the occupier of Allotment 6 Parish of Connangorach mentioned in item 8 of the said particulars.

The affidavit in support stated, among other things, that "The said complaint came on for hearing on the 8th day of January instant before the Court of Petty Sessions Horsham."

Dr. Madden, for the complainant, to show cause, took a preliminary objection that the Court had no jurisdiction, as the decision was by two justices, and not by Justices in Petty Sessions. By the *Water Act 1890*, s. 241, all rates may be recovered before two justices.

Mr. MacHugh for the defendant to move the order absolute. The affidavit in support states that the cause was heard by two justices in Petty Sessions. The complainant had two alternative remedies the one under this section before two justices, the other under the *Justices Act 1890* section 59 sub-section 5 before justices in Petty Sessions and he must be taken to have proceeded under the latter section. The complainant is estopped from taking this objection because he cannot now say that the order he obtained was a bad one.

Dr. Madden in reply—In the *Justices Act 1890*, section 59 sub-section 5 the words "sums of money" must be interpreted *ejusdem generis* with fines, penalties and forfeitures. This sub-section refers only to execution to enforce penalties already imposed.

WILLIAMS, J., I think I have jurisdiction.

Dr. Madden As to the first objection, the copies of the rate book are evidence under the *Water Act 1890* ss. 338, 339, of the valuations therein contained. As to the second objection the rate book itself was received in evidence as to the valuations therein contained. Moreover the valuer of the Council was called and swore to the valuations. The fourth objection is disposed of by the fact that the defendant had paid the Shire rates on the lands in question and had told a witness that he was the owner of the land. As to the fifth objection, there is an evident misprint in the *Government Gazette* notice by which the word "payable" is omitted so that "this rate is made on the 1st January 1891" should be "this rate is made payable on the 1st January 1891," and the justices so read it. See *Maxwell on Statutes* (2nd Edition) p. 524. As to the sixth objection, the property was in the division in which the lowest rate was imposed and as the property was rated at that lowest rate absence of proof of which division the property was in, is immaterial. This was a matter within the knowledge of the magistrates. The seventh objection is met by the fact that there was evidence that the defendant had told two of the witnesses that he was the occupier, besides which he paid the shire rates for this land. As to the third objection there was evidence of the valuation of all the lands specified in items 7 and 8 except two, and as to that the justices made allowances.

Mr. MacHugh. On the first two objections the *Water Act* provides no means for proving the valuation. The intention of the legislature is not carried out by the Act and we are entitled to take advantage of this fact. Further, on the second objection, the rate book is not a public document, and it is not open to the public to see *Jones v. Falvey*, 5 V.L.R. (L.) 230. As to the 3rd and 4th objections, assuming the rate book is not evidence there is no proof that the defendant was the owner. (WILLIAMS, J. I hold that the rate book was properly admitted in evidence.) As to the 5th objection since no demand need be made on a person before he is sued for water rates, he ought to know on what day the rate must be paid.

He was stopped by the Court.

WILLIAMS, J.—I think the fifth objection is sustained. But as I understand, that will only affect a part of the amount recovered. I therefore hold that the order of the justices is bad as to the rate for the year 1891, but good for the year 1890. Order absolute, order of the justices amended, and to be for L18 9s. 4d. I give no costs, as the defendant has asked for too much and has asked for it upon grounds on which he has failed.

Solicitors for complainant, *Chambers and Simons*, for *De Courcy Ireland*, Horsham; solicitors for defendant, *Tuthill, Geoghegan and Perry* for *Power*, Horsham.

(Before Williams, J.)

REID AND ANOTHER V. LUCAS.

29 April, 3 May.

Justices have no jurisdiction in suits by or against persons suing or sued in a representative capacity.

Order nisi to review order of justices.

A complaint was laid at Yackandandah by Eliza Reid and James Reid executrix and executor respectively of George Reid deceased against Thomas Lucas, for L7 10s. 7d. for goods sold and delivered. On the 7th March the justices dismissed the case with costs on the ground that they had no jurisdiction. On the 28th Holroyd, J., granted an order nisi to review this decision on the ground that the justices committed an error in law in adjudicating that, inasmuch as the complainants were suing in a representative capacity, the justices in petty sessions had no jurisdiction to adjudicate.

Mr. Geoghegan for the complainant to move the order absolute. *The Justices of the Peace Act 1865 s. 43* imposed a disability on persons suing in a representative capacity but that section was omitted from *The Justices Act 1887* nor is it in the *Justices Act 1890*.

Mr. Barrett as *amicus curiæ* pointed out that there were doubts as to whether this disabling clause was necessary inasmuch as the jurisdiction of justices was a statutory one and therefore did not extend to persons suing or sued in a representative capacity.

Cur. a'lv. vult.

WILLIAMS, J.—This was an order nisi to review a decision of Justices. There was no appearance for the complainant, but Mr. Barrett as *amicus curiæ* suggested to me that the justices had no jurisdiction to hear a complaint brought by or against a person in a representative capacity. He referred me to authorities cited in *Casey's Justices Manual* into which I have looked and I think that suggestion is sound, and that the justices only derive jurisdiction under the Justices Acts. I cannot find that they have jurisdiction conferred on them in suits by or against persons in a representative capacity. I therefore think that the justices' decision was right and that this order nisi must be discharged with costs.

Solicitors, *Tuthill, Geoghegan and Perry*.

(Before Hood, J.)

UPTON V. CHIPMAN.

9 May.

Practice—Pleading—Where a party intends to rely on previous dealings between the parties to add an implied term to a written contract he must set it out in his pleadings.

In this case the Statement of Claim set out that "By a contract in writing dated the 10th January, 1891, the defendant sold to the plaintiff 90 tons of Paraffine Wax to come forward in monthly shipments of not less than 15 tons at the price of 6½ cents. per pound on board at New York." The defendant in his defence said "that it was an implied term of the said contract in writing that the plaintiff should pay cash for the said wax therein mentioned upon the delivery thereof in accordance with the terms of such contract by the defendant and that after the making of the said agreement the plaintiff informed the defendant that he was unable to pay cash," &c., "thereupon the defendant declined to carry out his part of the said contract unless he was paid cash as aforesaid."

Upon this the plaintiff joined issue.

At the trial the plaintiff proceeded to lead evidence as to previous dealings between the parties under the contract.

Mr. Isaacs for the defendant objected that the evidence was irrelevant.

Mr. Duffy for the plaintiff.—It is intended to prove that there were previous dealings under the contract in which payment was not made by cash. If that is established the implication of law is set aside *Benjamin on Sales* 4th Edit. p. 678. It is not necessary to plead such a course of previous dealings and a consequent custom *King v. Reedman*, 49 L.T. N.S. 473. For if a usage is proved it is the same as if it were contained in the written contract, and if the defendant pleads an implied term in the contract, we, by simply joining issue, can at the trial prove a custom which overrides that term. He also cited *Spartali v. Benecke*, 19 L.J., C.P. 293.

Mr. Isaacs in reply.—A custom must be pleaded, *Sutton v. Ciceri*, 15 Ap. Ca. 144.

Hood J.—The objection is well founded. The object of the new rule is to supply the opposite party with all the facts intended to be relied on. The plaintiff here says that there is a contract in writing and the defendant says that there is an implied term of that contract. The plaintiff having simply joined issue upon that defence now wants to say, "True; that would be the effect of the contract under ordinary circumstances, but in this case the implied term is defeated by our previous course of dealing." This is a case for amendment on terms.

Solicitors for plaintiff, *Upton and Thomas*.

Solicitors for defendant, *Wilmoth and Wild*.

INSOLVENCY JURISDICTION.

(Before Hodges J.)

IN RE J. S. ELKINGTON.

5 May.

Insolvency Act 1890, s. 37.—A petitioning creditor who in his petition states that he holds a security for his debt and that he values it at nil, need not also offer to give it up for the benefit of the creditors—Where the respondent obtained leave to file objections *nunc pro tunc*, and in his affidavit in support verified 3 objections but filed 4, the fourth not being verified, he was allowed at the hearing to verify it.—Where the sheriff's officer under a writ of *fi. fa.* made a demand for payment on the respondent at 5 p.m. and not obtaining it thereupon made a return to the writ of *nulla bona*, held that the respondent had not a reasonable time to pay, and order discharged.

Order nisi in insolvency.

The Australian Financial Agency and Guarantee Company Limited, in voluntary liquidation, the petitioning creditor, on the 6th January 1892 obtained judgment against John Simeon Elkington, the respondent, for £484 5s. 7d.; upon this judgment they issued execution and the sheriff's officer made a return to the *fi. fa.* of *nulla bona*. This was the Act of insolvency alleged in the petition. The petition also set out that the petitioning creditor held no security whatever for the payment of the said sum save and except a policy of assurance upon the life of J. S. Elkington, which policy they value at nil. An order nisi was granted on the 1st April 1892. On the 14th April the respondent obtained leave to file objections *nunc pro tunc*, and in his affidavit in support verified the following objections.

1. That I have not committed the act of insolvency alleged in the petition.
2. That the petitioning creditor holds a security in addition to the security referred to in the petition which it has not valued nor offered to surrender for the benefit of my creditors.
3. That the petition and proceedings relating thereto are bad and inoperative.

The hearing was adjourned until 5th May and on the 3rd of May 4 objections were filed, viz., the 3 above set out and the following.—

4. That one James H. Riley the manager of the petitioning creditor herein agreed to compromise this matter and allow the same to lapse.

On the hearing evidence was given that the sheriff's officer made the demand under the *fi. fa.* at 5 p.m., that the respondent said to him "I cannot pay but you know I have a house full of furniture and a library," and that thereupon the officer made a return to the writ of *nulla bona*.

Mr. Woolf for the respondent to oppose the motion took an objection that as the petitioning creditor had in his petition valued his security at nil he ought to have offered to give it up for the benefit of the creditors. *In re Harward*, 4 V.L.R., (I) 65.

Mr. Hayes for the petitioner.—The *Insolvency Act* 1890 s. 37 gives two alternatives. If the petitioning

creditor values his security he need not state his willingness to give it up to the creditors. *In re Harward* the petitioner said that his security had no marketable value; and he did not value it, as he might have done for although it had no marketable value it might have been of value to the petitioner.

HODGES, J.—I overrule this objection. The words of the Act are plain; if the petitioning creditor has a security he must either offer to give it up absolutely, or if he is not ready to do that he must put a value on it. I agree with the decision in *In re Harward*, and it is not inconsistent with this decision. If it means what *Mr. Woolf* contends for I disagree with it.

Mr. Hayes.—The respondent cannot go into the 4th objection, as it is not verified, and has only now been added. *In re Fitzpatrick*, 10 V.L.R. (I) 6.

HODGES, J.—This objection ought to have been taken before. I will allow the respondent to verify the objection now.

Mr. Woolf.—There has been no proper return by the sheriff's officer to the writ of *fi. fa.*; it was his duty to seize the furniture and books. *In re Douglas*, 12 V.L.R. 265

Mr. Hayes in reply.—The answer made by the respondent justified the sheriff's officer in making the return of *nulla bona*.

HODGES, J.—The only question in this case on which I feel it necessary to decide is one upon which there is a conflict of evidence, and I must have recourse to that general practice of making that party fail upon whom the burden of proof lies. On the evidence I feel a doubt as to whether the respondent had an opportunity of paying the money, and if he had not this opportunity he did not fail to satisfy the writ, and as I am not satisfied that there was a failure to satisfy the writ, I shall discharge the order, but without costs, as the circumstances surrounding the case are not satisfactory.

Solicitors for the petitioning creditor, *Godfrey and Godfrey*.

Solicitor for the respondent, *Lewis*.

PROBATE JURISDICTION.

(Before Williams J.)

IN THE WILL OF IRVINE.

28 April.

Administration—Where a testator gave all his property to his wife for life and appointed his sons to be executors after his wife's death, administration *c. t. a.* was granted to the widow reserving leave to the sons to come in and prove the will after her death.

Motion for administration with the Will annexed.

William Ross Irvine left a Will containing the following clause: "I hereby give devise and bequeath to my wife Rachel Begg Irvine all my property both real and personal for her use and benefit as long as she lives and after her demise to my family their heirs, executors and assigns, and that my sons act as executors of this my Will after my wife's decease."

The present application was by Rachel Begg

Irvine and was that administration with the will annexed should be granted to her leave being reserved to the sons of the testators to come in and prove the will after her death.

Mr. Vasey for the motion.

WILLIAMS, J. Motion granted.

Proctors, Casey and O'Halloran.

(Before a'Beckett J.)

IN THE WILL OF STURROCK.

2 May.

Probate—Practice—The proper time to apply for a jury in a probate action is the day on which the order nisi is made returnable and not on the day on which the trial is set down for hearing. Where the caveator propounds a codicil to the Will propounded by the executors and does not object to the Will, the caveator must begin.

Motion for order absolute for grant of probate.

Dr. McInerney and Mr. Rickarby for the caveatrix applied for a jury.

Mr. Purves, Q.C., and Mr. Topp, for the executors, opposed the application except on the usual terms as to payment of costs of the adjournment.

A'BECKETT, J. I will go on with the case. I adhere to my view as to what the practice should be. The old practice was that the order *nisi* was obtained then the parties used to come to Court on a day fixed with all their witnesses and no body knew what was going to be done. Great expense was incurred and great delay was occasioned. To avoid this a practice was introduced, by myself, I believe, that on the day when the order *nisi* was returnable all the preliminaries should be settled. That would be the proper time to arrange for a trial before a jury. I think it would be most undesirable and wasteful for both sides to come prepared to begin and then for an application to be made for a jury. This should come on in the ordinary way as the Act directs. As the caveatrix propounds a codicil to the will and does not dispute the will she will begin.

Proctors for the caveatrix, Armstrong, Kyneton.

Proctors for the executors, Strongman and Crawford for Palmer, Kyneton.

(Before Williams J.)

IN THE WILL OF MARY CRAWFORD.

28 April, 3 May.

Probate—where the testator executed four testamentary documents, A B C & D of which A was a will and B and C codicils to it and D another will executed before C the codicil C revived the will A and probate would be granted to the will A and the codicils B and C.

Motion for probate.

The facts sufficiently appear in the judgment.

Mr. Evans for the motion

Cur. ad. vult.

WILLIAMS, J. On the 10th January 1890 the

deceased duly executed the will marked A. On the 5th September 1890 she duly executed the codicil to that will marked B. On the 26th September 1890 she duly executed the will marked D. Or the 16th August 1891 she duly executed the codicil marked C, and three days after executing this codicil she died. I am now asked to grant probate of either will A or will D and the question for me to consider is of which of these two wills ought I to allow probate. In *Jarman on Wills* 4th Ed. vol. 1 p. 181 it is stated "sometimes a codicil has the effect of impliedly revoking the posterior of two wills by expressly referring to and recognising the prior one as the actual and subsisting will of the testator," and at p. 189 of the same work *Lord Walpole v. Lord Orford* 3 Ves. 402 and *Crosbie v. MacDougal* 4 Ves. 610, are cited for the propositions:—(1) that if a testator makes two wills, the one earlier in point of date than the other, and he afterwards makes a codicil which he declares to be a codicil to the earlier will, this would set up the earlier in opposition to the posterior will, and (2) that parol evidence is inadmissible to show that the testator actually intended to refer to the latter will. Section 20 of the *Wills Act* 1890 does not appear to have affected the law upon this point and the doctrine laid down in *Lord Orford's* case still holds good. See *Jarman on Wills* at p. 191. Applying the doctrine I have stated to the present case I am of opinion that the testatrix in codicil C has given unmistakable evidence of her intention to revoke the will D and to recognise the will A as her actual and subsisting will, if she were of sound testamentary capacity at the time of executing codicil C. Upon the most important point the evidence before me is not satisfactory. The only evidence I have upon the point is that of one of the attesting witnesses, Andrew O'Neill. The other attesting witness, John Cole, makes no affidavit. Before granting probate of will A and its codicils B and C, I desire to have his evidence upon the mental state of the testatrix at the time of the execution of C, and also the evidence of Edmund Moloney the brother of the testatrix who is one of the executors appointed by A, who takes no interest under the will, and at whose house the testatrix was staying when she executed the codicil C, and any further disinterested evidence that may be procurable. When this further evidence is furnished to me I shall be disposed to favorably entertain the application for probate of the will A and its codicils B and C.

Proctors, Evans and Masters.

(Before Hodges, J.)

IN THE WILL OF PETER'S. MERCER.

5 May.

Probate—The Court will not extend the time within which application for probate must be made, viz., 6 months from the publication of notice of intention so to apply, without an affidavit explaining the delay.

Motion for probate.

Notice of intention to apply for probate of the will

of Peter S. Mercer was published on the 26th October, 1891.

Mr. Moule for the motion. This application is only a fortnight beyond the six months fixed by the rule of practice as the time within which the application must be made.

HODGES, J.—Six months has been fixed as the extreme limit of time within which the application must be made. There must be an affidavit explaining the delay.

Proctors, Davies, Price and Wighton.

SITTINGS IN BANCO.

(*Higinbotham, C.J., Williams, Holroyd, a'Beckett, Hodges, and Hood, J.J.*)

THE TRUSTEES AND COUNCIL OF THE ROYAL AGRICULTURAL SOCIETY OF VICTORIA v. THE MAYOR, ETC., OF THE TOWN OF ESSENDON.

Feb. 1st & 2nd.

Valuation of rateable property—Crown grant subject to restriction—Local Government Act 1890, s. 248.

(*Per Higinbotham, C.J.*) Where land is subject to certain restrictions and conditions, such land is only to be rated upon the annual value which a hypothetical tenant from year to year would give for the land if let to such tenant subject to such restrictions and conditions.

The Trustees of the Victorian Rifle Association v. The Mayor, etc., of Williamstown, 16 V.L.R., 251, corrected and assented to.

In determining the rate to which land is subject under the Local Government Act 1890, the net annual value to the occupier, and not the net annual income, is the fact to be ascertained.

Trustees to whom land is granted by the Crown in fee simple cannot ever become tenants from year to year of the land for the purposes of their trust, and cannot therefore be taken into consideration as possible or hypothetical tenants of the land.

(*Per Holroyd, J.*) In assessing either the net annual value or the capital value of land for rating purposes, the Court has not to take into account any condition imposed by law respecting the application of the revenue that may be derived from such land, but it must take into consideration all restrictions and conditions imposed on the user of such land.

The Trustees of the Victorian Rifle Association v. The Mayor, etc., of Williamstown, 16 V.L.R., 251, questioned.

(*Per a'Beckett & Williams, J.J.*) Where land produces an income, the ultimate purpose to which such income is to be applied is not to be taken into consideration in ascertaining the annual value of such land for rating purposes.

The Trustees of the Victorian Rifle Association v. The Mayor, etc., of Williamstown, 16 V.L.R., 251, dissented from.

(*Per Hodges, J.*) Where it is admitted that land is rateable, but no satisfactory evidence of the annual value of such land is given, the only course open to the

Court is to fix a nominal rate.

The Trustees of the Victorian Rifle Association v. The Mayor, etc., of Williamstown, 16 V.L.R., 251, dissented from.

(*Per Hood, J.*) In arriving at the annual value of land for rating purposes, where such land is subject to various restrictions and conditions, the real test to be applied is, what would a tenant give for the land provided that he is to be subject to the restrictions and conditions attaching to the land.

The Trustees of the Victorian Rifle Association v. The Mayor, etc., of Williamstown, 16 V.L.R., 251, assented to.

This was a case stated for the opinion of the Supreme Court by the Chairman of General Sessions. The trustees of the Royal Agricultural Society are the grantees in fee simple of the Crown of 30 acres of land at Bagotville for the purposes of a show-yard. The crown grant in question provides amongst other things that the land and buildings shall at all times be maintained and used for show yards in accordance with regulations to be made by the Governor-in-Council and for no other purpose, that the Crown may re-enter if the trustees permit or suffer the land or any part of it to be used for or applied for any other purpose or allow the premises to become out of proper order and repair or alienate or attempt to alienate this land or premises save in pursuance of a power contained in the deed to raise £15000 for certain purposes and all income derived from the land is directed to be expended on the objects of the society. The valuator of the Essendon Council valued the land at £14000 and the improvements at £16000 and striking an annual value of £1500 made the trustees liable for £112 10s. for rates. The trustees appealed to General Sessions and the learned chairman reduced the rate to 1s., but consented to state a case for the opinion of the Supreme Court.

Mr. J. D. Wood appeared for the Council of Essendon.

Mr. Coldham appeared for the trustees.

Cur. ad. vult.

March 31st.

THE CHIEF JUSTICE.—This is an appeal by the Mayor, Councillors, and Ratepayers of the Town of Essendon from the decision of the Court of General Sessions at Melbourne, by which a rate, made by the Appellants on land within the Town of Essendon at £1500 per annum, was reduced to 1s. The land in question is held by the Trustees, Respondents, under a Crown grant dated August 27, 1886 to the Trustees and their heirs "in order to provide a site for the "show yards of the National Agricultural Society of "Victoria for holding shows for the instruction of our "subjects and people." The Crown Grant contains certain provisos and conditions, one being that the land and buildings shall be at all times maintained and used as and for the show yards of the National Agricultural Society of Victoria in accordance with regulations to be made by the Governor-in-Council, and for no other purpose

whatsoever. It is also provided by the grant that the Crown may re-enter if the trustees should permit or suffer the land or premises or any part thereof to be used for or applied to any other than the purposes aforesaid, or to become out of proper order and repair, or should alienate or attempt to alienate in fee simple, or for any less estate or interest, the land and premises or any part thereof, save in pursuance of the power contained in the deed to raise a sum of money not exceeding £15,000 for the objects of making substantial and permanent improvements thereon. Prior to the issue of the Crown grant the land was permanently reserved from sale under the authority of *The Land Act* 1884, section 10, authorising the permanent reservation from sale of crown lands for any public purpose whatsoever including the purpose of public education. The trustees are empowered by section 2 of *The Land Act* 1889 which has a retrospective operation, to make, with the approval of the Governor-in-Council, rules and regulations for, amongst other things, "the collection and receipt by such trustees of "tolls, entrance fees, or other charges for entering in "or upon such lands or any specified part or parts "thereof." It is admitted that in this and in all other material particulars the powers and obligations of the respondents, as defined by the deed in this case, are not distinguishable from those of the trustees in the case of *Disney v. The Mayor etc. of Williamstown*, 15 V. L.R. 59, which was confirmed and explained in a subsequent judgment of this Court reported in 16 V.L.R. 251, under the title of *The Trustees of the Victorian Rifle Association v. The Mayor etc. of Williamstown*." The present case was argued before the Full Court consisting of three Judges on August 19 and 20 last year, and in consequence of doubts entertained by some members of the Court as to the application of the rule of computation of value of the rateable property at the net annual value prescribed by section 248 of the *Local Government Act* 1890, it has been deemed advisable, in view of the great importance and difficulty of the questions involved in the appeal, to have the whole case re-argued in this court before all the Judges. Much of the confusion arising from the English authorities which have been cited will be removed if we remember that neither in the present case nor in *Disney's* cases did the question of the rateability of the land come before us for determination. It has been admitted in both cases that the land is rateable property within section 246 of the *Local Government Act* 1890, and for this reason the Court in *Disney's* cases, and the Court of General Sessions in the present case, allowed the rate to stand, but reduced it to a nominal amount. In Victoria, by virtue of this section 246, all land is rateable property except in certain enumerated cases. The English authorities on the subject of rateability for the poor, including the leading case of the *Mersey Docks Company v. Cameron*, 11 H.L. 440; 35 L.J. Mag. Cas. 1, decided in 1864-5, which swept away a large number of earlier decisions, have turned upon the meaning and effect of the Statute 43 Elizabeth Chap. 2. They decided that under that statute the liability to be rated attaches,

except in the case of the Crown, upon every occupation from which benefit is derived, although the occupation be for a purpose which may be deemed to be of a public nature. If the occupation be beneficial the fact that such occupation is of necessity applicable solely to purposes, whether public or otherwise, from which the occupiers received no personal benefit is not a ground of objection to the property being rateable. *St. Thomas's Hospital v. Lambeth Overseers*, 45 L.J. (N.S.) Mag. Cas. 24. These authorities, together with all questions concerning the beneficial occupation of land, should be dismissed from consideration as inapplicable to Victorian law on the subject of rateability. The English and the Victorian law are, however, substantially the same in respect to a wholly different part of this subject, namely, the computation of the value of property admitted to be rateable, at its net annual value. The law of England upon this subject is laid down by the Parochial Assessment Act, 6 and 7 William IV. Chap. 96, Section I., as follows;—

"No rate for the relief of the poor in England and Wales "shall be allowed by any Justices, or be of any force, which "shall not be made upon an estimate of the net annual value "of the several hereditaments rated thereunto, that is to say, "of the rent at which the same might reasonably be expected "to let from year to year free of all usual tenants rates and "taxes and tithes commutation and rent charge, if any, and "deducting the probable average annual cost of the repairs, "insurance, and other expenses, if any, necessary to maintain "them in a state to command such rent."

Section 248 of the *Local Government Act* 1890 contains similar provisions in the same terms with an immaterial difference. The case of the *Corporation of Worcester v. Droitwich Assessment Committee*, 2 Ex. D. 49, upon which the judgment in *Disney v. Mayor etc. of Williamstown*, 15 V.L.R. 59, was founded, is a decision of an English Court of Appeal turning on the rule given by the above section of the Parochial Assessment Act, and it is therefore a decision which this Court recognises as binding on it. In *Trimble v. Hill* 5 Ap. Cas. 344-5, the opinion was expressed by the Judicial Committee of the Privy Council that where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has received an authoritative construction from a Court of Appeal in England, by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords, such construction should be adopted by the courts of the colony. This opinion or suggestion is founded on the view that "it is of the utmost importance that in all parts of the "Empire where English law prevails the interpretation of that law by the courts should be as nearly as "possible the same." The suggestion comes to this court from the highest authority, and the reason assigned for it has had our entire concurrence—see *Cremer v. Cremer*, 12 V.L.R. 744. In *re Allen's Caveat* 17 V.L.R. 108. In the case of the *Corporation of Worcester v. Droitwich Assessment Committee*, 2 Ex. Div. 49, it was held that where land is used for a public purpose, and the occupiers thereof are prevented by Statute from deriving the full personal benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually

made and not with reference to the amount which might be earned by a trading company, or other occupier, not subject to the statutory restriction. It was admitted that the water works, in respect to which the rate in that case was fixed, were rateable property; the question in dispute was to what extent they were liable to be rated. The Court of Appeal held that the corporation could only be assessed for the rent which a tenant from year to year would give for the land subject to the same statutory restrictions as those under which the corporation held it, and not that which a tenant entirely unfettered might give—"The hypothetical tenant," the Court said, "is to be a 'tenant subject to the restrictions.'" The case of "*Corporation of Liverpool v. Overseers of Wavertree*" reported in note to page 55, 2 Ex. D.) "is directly in point, and we are of opinion that that case was 'correctly decided. BLACKBURN, J. there says, 'The 'whole question turns upon the rule given by the 'Purochial Assessment Act, which says the occupier 'is rateable at what a tenant from year to year will 'give as the rent, who takes the land subject to the 'same restrictions as those under which the tenant 'holds it.' This decision seems to us to be right on principle. An occupier of land is not rateable in respect of the whole profit derived from the land, 'but only in respect of the profit which he himself 'derives from the land.' The corporation in that case were authorised by the *Public Health Act*, 1848, section 17, to charge such a rate only as might be reasonably expected to be necessary to defray the expenses incident to the water supply, and they accordingly fixed a price to be paid by the inhabitants for water so low as to leave a net profit of only £600 upon rates actually received after deducting the expenses connected with providing the water and collection of rates. This sum represented the amount which the corporation failed in their prospective estimate to deduct from the water rate in accordance with the statutory direction; it was undoubtedly profit earned during the year in consequence of the erroneous estimate, and it was properly admitted by the corporation to be profit, and it was accordingly agreed that it should be taken as the gross estimated annual value of the land and works, and the rateable value, reduced by the statutory deductions, was fixed at £540. It necessarily follows from the principle laid down in this case that if the occupier is restricted by statute from deriving any profit at all from his occupation the hypothetical tenant, who has to be taken to be subject to the same restrictions as the occupier, will not give any rent for the land, and consequently that the land, although rateable and therefore liable to be rated at a nominal sum, cannot lawfully be rated at more than a nominal sum. *Disney v. The Mayor etc. of Williamstown*, 15 V.L.R. 59, was decided by this Court in accordance with the principle here laid down. We held that the restrictive conditions of a crown grant of land permanently reserved for the purpose for which land is authorised by an Act of Parliament to be permanently reserved and alienated would have the same effect as an Act of

Parliament, and that, as the trustees in that case could not consistently with the terms of their trust derive any profit whatever from the rifle ranges, while they were at the same time bound to maintain the ranges, the rate should be reduced to a nominal amount. It has been contended in the recent argument that the net income of the trustees, that is to say the moneys received by them from any source beyond what is required to defray necessary expenses and to keep the land and buildings in proper order and repair, should be treated as the net annual value of the property, or the rent at which it might reasonably be expected to let from year to year. In the *Droitwich* case the net income of £609 was profit which the corporation had made during the year in consequence of their erroneous estimate and it was therefore properly taken to be the gross estimated annual value from which the rating value could be calculated. In *Disney's* case and in the present case the net income is not profit in any sense of the word, for the trustees are bound by the terms of their grant to apply it to purposes of their trust and it has not been suggested that they have not so applied it. This argument also assumes that the hypothetical tenant would not be bound by the obligations cast upon the trustees, and might be regarded as entitled to apply such net income to his own purposes. But this view is inconsistent with the authority upon which our first decision was founded and it is opposed, I think, to the principle of the test of computation laid down by the act. If the trustees are restricted by the conditions of the grant from deriving any profit from the occupation of the property, and if the hypothetical tenant is also bound by the same restrictions he cannot be conceived to be at liberty to take for himself as profits what are not profits in the hands of the trustees. The net annual value, not the net annual income, is the fact to be ascertained, and the Act prescribes that the mode by which that value is to be ascertained is by considering what rent a tenant from year to year would give for the property. If the property has no annual value no sane person would give any rent for it, and consequently the property, although rateable and liable to be rated at a nominal amount cannot by the application of this statutory test of computation be rated at more than a nominal amount. It has been further argued for the appellants that the trustees themselves might be regarded as the hypothetical tenants of this land and that the gross and rateable values might be calculated by the rent which the trustees might reasonably be expected to pay for the land for the purposes of the trust. *The Queen v. The School Board for London* 17 Q.B.D., 738 was relied on in support of this view. In that case the School Board could be a tenant of the premises, and it was admitted that if by the terms of any Statute the School Board could not legally be tenant it would be excluded from the calculation. See per Lord Esher, M.R., page 740. That case was followed by the case of *The Owen's College v. Overseers of Chorlton-upon-Medlock*, 18 Q.B.D., 403. There, trustees were incorporated under an Act of Parliament for the purpose of establishing and for ever maintaining a

college for educational purposes. They were by the act empowered to acquire and hold as owners in fee simple the land as a site and to erect buildings thereon for the college, and they had no power to sell or let the land so acquired though they were not expressly prohibited from doing so. It was held that the trustees could not become tenants of any site for the purposes of the college, but that the only site they were authorised to take was one which they were to acquire as owners in fee simple per Lord Esher p. 407; also that the land after it was acquired by the trustees was dedicated for ever as a site of a building for the college; that the Trustees were incapable of hiring that land for the purposes of a college, and that being prohibited from hiring that land they could not therefore be taken into consideration as possible tenants, per Fry, L.J., page 411. The same distinction was recognised in *The Mayor of Burton-upon-Trent v. The Assessment Committee of Burton-upon-Trent Union*, 25 Q.B.D., 197. Applying the doctrine of these decisions to the present case I think that the trustees could not, as owners in fee simple under the terms of the Crown grant, ever become tenants from year to year of this land for the purposes of their trust, and they cannot therefore be taken into consideration as possible or hypothetical tenants. The twofold argument for the appellants on this part of the case has, in my opinion, failed. The test of net annual value is sometimes an unreal test and difficult to apply to the subject matter rated (per Lindley, L.J., in *Smith v. Churchwardens of Birmingham*, 22 Q.B.D., 708). If this test can be applied and is applied in the present case to the land rated the resulting net annual value, and consequently the rate can only be nominal; if on the other hand the test cannot be applied because the land is held in fee simple by the trustees, neither they nor anyone else could hold it as tenant from year to year. The result is the same, and the land, though rateable, can only be rated for a nominal amount. The argument addressed to us on the second test of rateable value contained in Section 248 of the *Local Government Act 1890*, namely, £5 per cent. (reduced by a later Act to £3 per cent.) upon the fair capital value, has not altered the view expressed by the members of the Court on this subject in *Disney v. The Mayor, etc., of Williamstown*, 15 V.L.R. 59. I adhere to the views on both the points determined by the Court in that case. The subsequent case of *The Trustees of the Victorian Rifle Association v. Mayor, etc., of Williamstown*, 16 V.L.R., 251, requires an obvious verbal correction, to avoid a possible misapprehension, by the addition of the words "beyond a nominal amount" after the word "rated" in the tenth line from the bottom of page 254. The judgment so corrected is, in my opinion, that which it purports to be, namely, an explanation of the earlier decision and consistent with it. It in no way alters or extends the previous decision of the Court. I am of opinion that the decision of the Court of General Sessions was correct, and that it ought to be affirmed.

The determination of the Court is, that the decision of the learned Chairman of the Court of General

Sessions shall be upheld.

MR. JUSTICE HOLROYD.—Section 248 of the *Local Government Act 1890* is not easy to construe. If we discard the authorities, and look at the section as it stands, what do we find? We find that in valuing any rateable property within a municipal district it is the net annual value that is first to be computed, and the section defines what that value is. It is the rent at which the property might reasonably be expected to let from year to year free of all usual tenants rates and taxes, less the probable annual average cost of insurance and other expenses (if any) necessary to maintain the property in a state to command such rent. We cannot read the definition quite literally; for, if the property could not be lawfully let from year to year, it could not reasonably be expected so to let at any rent, and the owner might easily lay upon the occupier a prohibition which would practically exempt the property from being rated at all, to the mutual advantage of both parties. The valuer must be intended to assume for the purpose of his computation that the property can be lawfully so let. The whole scheme of computation rests upon hypotheses. If you can suppose a person desirous of becoming tenant, why not suppose also that it would be legal to let to him from year to year? The annual value when computed is to be taken as the rateable value of the property provided it does not fall below 5 per cent. (since altered to 3 per cent. by the *Local Government Act 1891* s. 55) upon the fair capital value of the fee simple, in which case 5 per cent. upon the fair capital value of the fee is to be deemed the rateable value. The first question then which the valuer has to ask himself is, what rent might the person liable to pay the rate upon this property, whether occupier or owner, reasonably expect to get for it, if it were lawful for him to let it, and he wanted to let it, from year to year, and for the purpose of this computation he must take the property as he finds it, and not speculate as to the purposes to which it might by the expenditure of money be converted. The probable cost of maintenance in *statu quo* is to be deducted from the rent that might be obtained, not the cost of conversion into something different, as of a house into a shop, or pasture land into arable. Should the property from any cause be so unsuitable for letting from year to year, that it would be unreasonable to expect it to yield a rent equal to the requisite percentage on the capital value, then the valuer is to calculate the capital value of the fee simple, that is, what sum the fee simple would fetch in the market, if judiciously sold, which would depend very much upon the purposes to which it could be converted by a buyer, and the demand for property of that description in the neighbourhood. To answer the question as to annual value, the valuer will naturally inquire what is the property fit for, for what can it be used. At this stage he may encounter a difficulty, which would not be likely to occur to his mind, unless it were subsequently brought home to him by an appeal against his valuation. Is he to confine his researches to the description, character, and

condition of the property, as, if it be in town, whether it be mansion, shop, cottage or factory, what accommodation it affords, in what locality it is situate, and whether it be in good or bad repair? Or must he push his investigation farther; to ascertain whether any conditions or restrictions have been imposed upon the enjoyment of it? I do not speak of conditions intended merely for preserving its character, as by preventing a dwelling from being converted into a shop, or arable land into pasture, but arbitrary conditions, and such as would diminish the amount of the rent that a person desirous of becoming a tenant from year to year might otherwise be expected to offer for the property as it is. Now, inasmuch as rateable property is all land, and all land is rateable property except what is expressly excepted by the Act, and the assessment for rating is not to be fixed at less than a certain percentage upon the capital value of the fee simple, which is the largest estate that can be had in the land, it appears to me, apart from authority, that when any such conditions or restrictions as I have mentioned, which affect the enjoyment only, have been imposed, whether by a private individual or by the law, they ought not to be taken into account, or at least not in estimating the capital value. It seems now to be admitted, that, if any such have been imposed by a private individual, they ought to be disregarded. But in the case of *Disney v. The Mayor &c. of Williamstown* (15 V.L.R. 59) it was undoubtedly decided that, when the user of the property rateable has been restricted, or conditions have been attached to it, by law, such restrictions and conditions must not be overlooked in the computation—either of the annual value or of the capital value. I confess that, if the matter were *res integra*, I should be disposed to call in question the soundness of that decision. I cannot, in this instance, appreciate the distinction between restrictions imposed by law, and restrictions legally imposed by a private individual. But seeing that the decision referred to, besides being supported by English authority, has met with the unanimous approval of my brother Judges, I must treat this point as finally settled. It has, however, been supposed that something more than I have stated was decided in *Disney's case*, although the judgment of my brother a Beckett, when carefully examined, convinces me that he personally intended to go no further. The subsequent case of *The Trustees of the Victorian Rifle Association v. The Mayor &c. of Williamstown* (16 V.L.R. 251) was founded upon *Disney's case*, and purported to follow and explain it, and there it was distinctly laid down that not only restrictions upon the enjoyment of the property, but also conditions affecting the disposition of the profit that might be derived from it, were to be regarded in the valuation. In delivering the judgment of the Court, of which I was a member, the learned Chief Justice says: "It does not matter what revenue the trustees raise or might raise for the lawful use of the land for the purposes of the trust. . . . But they are bound to apply the whole of the revenue so raised solely to the purposes of the trust. They have not not in law any

"beneficial occupation of the land, and they cannot lawfully derive any benefit whatever for themselves from the revenue raised from the land." The words "for themselves" have slipped in inadvertently. All that was intended to be said was that the occupation could not be beneficial at all by reason of the direction to apply the revenue to the purposes of a public trust. Upon a reconsideration of the whole matter, and feeling myself for the moment untrammelled by authority, I think it is only by putting a forced construction upon the 24th section that the principle enunciated can be spelt out of it. According to what I conceive to be the natural construction, the valuer is to compute what rent the hypothetical tenant would probably give, supposing that he could do as he pleased with any profit that he might get from the land; and, were I not bound by *Disney's case*, I should add, and supposing that he could use the land as he liked so long as he did not alter its character. It seems still more plain to my comprehension that the value of the fee simple should be assessed as if it were unfettered by conditions. If conditions must be regarded, why not inquire to what encumbrances, if any, the property is subject? Upon the question which was debated before us I think not much assistance can be derived from the English authorities. I should pay great respect to English precedents where our legislature had expressed its whole intention in the language of an English Act of Parliament, and particularly where the circumstances were identical or closely similar. But it is quite a different thing to follow the English interpretation of a scrap of an act, or a fragment of a section; and especially so when the circumstances to which it has to be applied are dissimilar. The addition of a clause or a change of circumstances may put an entirely different complexion upon the enactment. The proviso in section 248 of our Local Government Act, which is highly important, and furnishes a key to the section, is not contained in section 7 of the English Act 6 and 7 Wm. 4, c. 96, "an Act to regulate Parochial Assessment;" and section 1 of the English Act contains a proviso, which is not to be found in our Act. The Court of General Sessions in this case has stated the facts specially for the determination of the Supreme Court thereon. We were told that the Court proceeded in its judgment upon the principle that conditions imposed by law respecting the application of the revenue that might be derived from rateable property, as well as those restrictive of the user of it, were to be taken into account in assessing either the net annual value or the capital value. That I think wrong. But following as I must, the rule as to restrictions on user laid down in *Disney v. Mayor etc. of Williamstown*, the rate, in my opinion, was properly reduced by the Court to one shilling. The Crown grant under which the land was held by the trustees recites that it had been permanently reserved from sale by the Governor in Council for the purposes thereafter appearing; and provides that the grant shall be subject to certain conditions; amongst others, that the land granted and the buildings thereon shall

be at all times thereafter used as and for a site for the show yards of the National Agricultural Society of Victoria and offices and conveniences connected therewith, under such regulations as shall from time to time be made by the Governor in Council and in the meantime under regulations to be made by the trustees, and for no other purpose whatever. The grant also contains a clause of re-entry in certain events, and amongst them in the event of the trustees permitting or suffering the premises or any part thereof to be used for or applied to any other purpose with an exception of no moment as regards this argument. It would be unreasonable in my judgment, to expect that any person would become tenant from year to year of this land at any rent subject to such conditions, or that the fee simple, if the enjoyment of the land were hampered in this way, could have any marketable value.

MR. JUSTICE A'BECKETT (concurred in by Mr. Justice Williams). This is an appeal from a decision of a court of General Sessions reducing the valuation of land held upon trust for public purposes from £1,500 a year to one shilling. The conditions of the crown grant are substantially identical with those of the grant which was considered by this court in the cases of *Disney v. The Mayor of Williamstown*, 15 V.L.R., 59, and *Trustees of Rifle Association v. The Mayor of Williamstown*, 16 V.L.R. 251. As frequent reference to these cases is necessary I will refer to them as Disney's Case No. 1 and Disney's Case No. 2. When the appeal was first heard the respondent's council informed us that the learned judge at General Sessions had reduced the rate to 1s. on the authority of Disney's Case No. 2, and counsel before us relied on that case as concluding the matter as it undoubtedly did. Two of the judges who heard the appeal, dissented from Disney's Case No. 2; but as it was a decision of the full court it was thought desirable to have the appeal re-argued before all the judges. It is to be observed that the decision in Disney's case No. 2 purports to follow the previous decision in Disney's case No. 1; but in fact it decides a new point. In Disney's case No. 1 the justices upheld the contention that the fee simple should be valued without taking into consideration the conditions and restrictions of the Crown Grant and the question for the opinion of the Full Court was whether this determination was erroneous in point of law. It was held to be erroneous. In Disney's case No. 2 it was decided that no matter what amount of revenue might be raised consistently with the terms of the grant inasmuch as the trustees were bound to apply the whole of the revenue so raised solely to the purposes of their trust they had not in law any beneficial occupation and the land was exempt from liability to be rated. Now, although in Disney's case No. 1 there are dicta in the judgment of the learned Chief Justice to that effect they go beyond anything which was argued or decided in that case. It is one thing to say that when the conditions of a crown grant reduce the income which can be produced by the land, the value of the land is to be measured by its reduced income and another thing to say that

when the land comes to be rated this reduced income is to go for nothing because it is to be applied to trust purposes. As one of the judges who heard Disney's case No. 1 said "When lands have been vested in trustees for purposes of public utility as for water or gas supply the annual value is not to be assessed by treating the lands as available for ordinary letting purposes. The net revenue derivable from the property used as law requires it to be used is the basis of valuation." If Disney's case No. 2 were reversed it would leave untouched the decision in Disney's case No. 1. I now proceed to state my reasons for dissenting from Disney's case No. 2. According to English decisions, although legal restrictions upon the use of land are to be regarded in measuring its productiveness for rating purposes, the land is rateable although the income produced is to be applied to public purposes or charitable purposes from which the occupant can derive no benefit. "If any profit be made the application of it when made is immaterial to the question of rateability." *The King v. Inhabitant of St. Giles York 3 B. and Ad. 573*. A series of decisions has established the principle stated as follows by Lord Chelmsford in *St. Thomas's Hospital v. Lambeth Overseer* 45 L.J. Magistrates cases p. 24. "There being property of which the beneficial occupation is of necessity applicable solely to purposes whether public or otherwise from which the occupiers receive no personal benefit, that is not a ground of objection to the property being rateable." Therefore according to English law which our court has heretofore followed in rating cases. Disney's case No. 2 is clearly wrong in deciding that because the income which the land produced was devoted to trust purposes the land was exempt from rating. But it has been suggested that although the decision may be wrong in stating that the land is exempt from rating it is right in result as when the land comes to be valued for rating purposes under our Act, its value must be taken to be nothing. It is said that under section 248 of our Act you are to measure value by ascertaining what a hypothetical tenant would give for the property and as the hypothetical tenant would give nothing for the right to receive an income which he could only apply to trust purposes, the land must be valued at nothing. Our section provides that the property rateable "shall be computed at its net annual value that is to say at the rent at which the same might reasonably be expected to let for from year to year with certain deductions. The corresponding section of 6 & 7 Wm. 4 c. 96 provides "that the estimate shall be made of the net annual value, that is to say of the rent at which the same might reasonably be expected to let from year to year, with certain deductions." As the English section as to mode of assessing value is substantially the same as our own I consider that the English decisions which establish the proposition that land held for trust purposes is not exempt from rating are decisions showing that such land can be valued for rating purposes. I cannot suppose that a question would have been repeatedly argued and decided, the answer to which would be barren in result and would

establish that land was not exempt from rating, which when rated could be valued at nothing. In deciding that the land was rateable English judges must also have decided that it could be valued for rating purposes. I admit that these decisions do not explain how the difficulty is got over as to finding what the hypothetical tenant would give where land is held by trustees for public purposes but it must in some way have been surmounted. In several decisions dealing not with the abstract question of rateability, but with the amount at which the property is to be rated, a substantial amount has been fixed where it was perfectly clear that the income of the property was by law devoted to a specific purpose from which the hypothetical tenant could derive no benefit. In the *St. Thomas's Hospital* case, a hospital established by charter the revenue of which was to be spent "for the use and maintenance of the poor, sick and infirm" was assessed taking £10900 as the rateable value. The Governors of the Hospital appealed on the ground that the revenue was to be held in trust and the appeal was dismissed. No difficulty was suggested as to the hypothetical tenant, who, if he were bound by the trust, could not receive anything for his own benefit. In *Corporation of Worcester v. Droitwich Assessment Committee 2 Eachquer Division*, p. 49, all the revenue collected by water rates was to be devoted to the improvement of the supply and it was said "The Corporation having in view the benefit of the inhabitants have made the scale of rates so low as to leave a profit only of £600 upon the rates actually received after deducting the expenses connected with providing the water, collection &c., upon which amount they contend they ought to be rated." They were rated accordingly. The hypothetical tenant is referred to in the judgment which may have assumed that he could put this £600 into his pocket though the Corporation were bound to devote it to the improvement of the Water Supply. To the same effect is the case of *Mayor of Liverpool v. Overseers of Wavertree* reported in a note to the *Droitwich* case. In *Ultrincham Union v. The Cheshire Lines Committee 15 Q.B. Division* a Railway Company governed by private Act of Parliament was assessed for four miles of its lines on the limited profit to which the Act restricted it. It could not be supposed that this four miles of railway could in fact have been let or that a hypothetical tenant could appropriate to himself the profits of the company. There is no doubt that the section under which the property is valued has to be strained to meet cases of this kind and is often difficult of literal application. In the case of *Hackney v. Lamberhurst*, 1 El. B. & L. 41, observations will be found as to its extension by analogy to deductions not specified in the section with respect to properties as to which the supposition of a letting in the ordinary sense cannot be applied and to which the deductions specified in the section are inapplicable. We apply it under our own law to parts of public works for gas supply, water supply or railway communication. Applying the section in these cases necessarily involves an assumed alteration of the law under which the property is held.

We find a hypothetical tenant for a property which the law does not allow to be let, part of an undertaking which is held as a whole under an act prescribing how the property is to be used and who is to use it, and we assume that the tenant can receive and keep what the law would not allow him to obtain. It is no greater departure from fact to assume that the imaginary tenant of land held for trust purposes could apply for his own benefit the income which law requires the trustees to devote to trust purposes. But to my mind a more satisfactory solution of the difficulty is to regard the opening words of section 248. "The property shall be computed at its net annual value" as the governing words and to read the words "that is to say at the rent, &c.," as subordinate and only applicable where the property is of a kind which could be let. Where you cannot apply the test provided by the section for ascertaining net annual value you are not to say that the land is of no annual value; but you must resort to some analogous calculation to ascertain what the value is. It seems to me most unreasonable to relieve land from its liability to rates because you cannot literally apply the section which provides how it is to be rated. It is clear that land held by trustees for public purposes is not intended to be exempt from rating, for in the list of exceptions in Section 246 of the Act, there is an exemption of land held by the Crown for public purposes. It is obvious that the revenues of the trustees of land held for public purposes may be largely increased by roads, lighting, and other local improvements to which they ought to contribute, and yet it has been argued that such land is to go free because the section under which all descriptions of property are to be rated does not conveniently fit it. This is to defeat the object of legislation by the words intended to define the means by which the object is to be attained, and to treat a difficulty as insuperable which English authorities have effectually disposed of. I have dealt with the case so far upon principle, not upon the meagre evidence before us, because it was upon the principle laid down in *Disney's case No. 2* that the case was decided in General Sessions and was first argued before us. No question arose then as to whether the land did in fact produce an income. I am anxious to dissociate the question of principle from the question of evidence. Admittedly we have not to deal with land which, as described in some of the cases, has been struck with sterility, because law has decided that it shall be applied to purposes which can produce no income or to purposes which produce an income only sufficient to pay the expenses of earning it. In such a case there is no income or no surplus income, and there is no net annual value and nothing to rate. The principle upon which the present case was decided would apply to a grant where a large income was undoubtedly produced, as, for instance a grant to trustees of land to be let for agricultural purposes and the net rents to be held in trust for the maintenance of students at an agricultural college. According to *Disney's case No. 2* and the present case whatever the amount of the net rents,

of such land might be, the land could only be rated at a shilling. Is this or is it not the correct view? I hold that it is not. What is the exact effect of the evidence before the General Sessions as to the value of the land here is a doubtful matter and comparatively unimportant. It appears that some evidence of income produced was afforded by a balance sheet of the Agricultural Society from which it might be inferred that income reached the trustees. There was also a statement the grounds of which were not explained or tested by cross-examination as to the capital value of the land taking into account the restrictions of the Crown grant. This was the only evidence by which a definite amount could be arrived at and was not satisfactory. For this reason I think that the decision of the court below may be sustained though the ground on which it proceeded was erroneous.

N.B.—My brother Williams desires me to add that he concurs in this judgment.

MR. JUSTICE HODGES.—The only question we have to decide in this case is, was the decision of the General Sessions right? In my opinion it was. This Court decided in *Disney v. The Mayor etc. of Williamstown* 15 V.L.R. 59, that where land has been reserved for certain public purposes and is afterwards conveyed in fee to trustees for these purposes, the Municipal council in estimating the rateable value of such property must take into consideration the restrictions and conditions in the Crown grant. When the present case came before the Court of General Sessions there was no satisfactory evidence given of the yearly value of this land with all the restrictions in the Crown grant or that the land with these restrictions was of any value. And as it was admitted that the land was rateable the only course open to that Court was to fix a nominal rate, which it did. That is all the Court has to decide and as I do not entirely concur in any of the judgments and as everything outside the decision will be *obiter*, it seems to me better not to embarrass future argument and the ultimate determination of this question by more *dicta*. Though it may be proper to express in so many words that the case called *Disney's No. 2* is not in my opinion law.

MR. JUSTICE HOOD.—The matter for our determination in this case is not the liability of the land to be rated but the amount of the rate that ought to be imposed, the appellants not raising any question as to rateability. Land in this colony even though it be "struck with sterility" is rateable and the possibility or impossibility of beneficial occupation can only be considered as an element in arriving at the amount of the rate. By the *Local Government Act* 1890, section 248 is provided the method for arriving at that amount. An annual value of not less than £5 per centum upon the capital value is to be ascertained and this in every case is a question of fact to be determined upon proper evidence. The annual value which the Act contemplates is the rent which a tenant might reasonably be expected to give from year to year subject to certain deductions. In ordinary cases this rent may be estimated with comparative ease, but from time to time exceptional

instances have occurred which have presented various difficulties, the chief being in the cases of tramways and gasworks, or cases like the present where practically the properties cannot be let and the whole matter then becomes one of theorizing and guessing. I doubt if the legislature ever contemplated these cases when the Act was passed and the difficulty arises which so often arises of the Court having to apply a statutory test or definition to subject matters to which it is really not applicable at all (see per L. Coleridge in *Smith v. Churchwardens of Birmingham*, 22 Q.B.11. 703). However, the difficulty has to be faced and the Courts have done so by imagining an impossible hypothesis. They have created a hypothetical though impossible tenant and then endeavoured to find out the rent such a tenant would give. That is the statutory and judicial interpretation of the words "net annual value" *Smith v. Birmingham*, 22 Q.B.D. at p. 220. Then is added a qualification, the tenant is to be a tenant upon the terms peculiar to the property.

"It is not reasonable to expect that any rent could be obtained, except such rent as the premises might command as affected by the statutory conditions, and the possible tenant is to be the tenant of the premises in the state in which the Act says they are to remain *Owen's College v. Overseers of Charlton*, 18 Q.B.D. at p. 410."

"The legal principle is thus, you are to take the annual value to be the rent which a hypothetical tenant from year to year would give for it if he had it upon the same terms as the actual owner has it *Densburg Waterworks v. Pennistone Union*, 17 Q.B.D. at p. 387.

So that to arrive at the net annual value of the land you must consider it with all its natural and statutory advantages and disadvantages. In the present case the title to the land is one that it is not easy to classify under any of the usual headings. The Crown grant is clogged with various restrictions, all of which materially affect the value of the land. Therefore the substantial question is what would the property bring in the open market burdened with the conditions in the Crown grant. In order to arrive at the hypothetical tenant the land must be supposed to be in the market and then the way to ascertain its value is to say "there is the land, these are the conditions under which it can alone be occupied, what rent is it reasonable to expect that anyone will give." In arriving at a determination on this point we ought not to confound the rateable value of the property occupied, with the remunerative value to the present occupier, *Reg. v. Rhymney Ry. Co.* L.R. 4 Q.B. at p. 283). The fact that a profit or a loss arises from the property only constitutes one out of many elements in determining its value. We have no concern with beneficial occupation under our law except so far as it may indirectly induce a tenant to pay a rent. In England if property will let at a rent it is immaterial for rating purposes to enquire what becomes of that rent or what the landlord may have to do with it when he receives it. In order to support a rate on the grounds of beneficial occupation it is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings and land occupied by bare trustees is not exempt from rating under this test *Mersey Docks v. Jones*, 11 H.L.C. 440). But it is obvious that it is one thing to say that prop-

erty is not exempt from rating and a totally different thing to say how the amount of the rate is to be arrived at. Land may produce a net annual income and so be capable of beneficial occupation while at the same time its occupation may be so burdened with conditions and restrictions that it could not be reasonably expected to let at any rent. To arrive at the amount of the rate we have to consider the probable rent which is the test of the net annual value. But value to whom? Surely not to imaginary persons under imaginary circumstances. We are obliged to assume a hypothetical tenant but ought we to assume anything more? Is not the real test of value which the property as it is will bring in open competition?

"Would the property fetch money in the market if the owner wished to let it? If he could let it only on terms which would give no benefit no one would occupy. Could the owner find a tenant who would pay him any rent? That depends on the benefit to be derived from the occupation." Per Brett, M.R., *West Brunswick School Board v. Overseers of West Brunswick*, 13 Q.B.D. at p. 411.

So if by law no one can derive any benefit from the occupation what is the value of the land? In the present case we have this important element. The trustees are not to have the handling of any profits. They merely hold the land in trust, to allow the society to use it. It is true that the Crown grant speaks of a mortgage over the profits but I fail to see where the trustees are to get any profit from. They are not to use the land themselves nor allow anyone but the society to use it, and it can hardly be conceived that they are to charge the society for the use of it. At all events no such power of charging is contained in the grant. The trustees it is said by virtue of section 137 of the *Land Act* 1890 may make regulations for collection and receipt by them of entrance fees on such land. Assuming for the sake of the argument that this particular statutory power would pass to the imaginary tenant, yet no evidence had been given that any such regulations were ever made or any such fees ever received. So that an intending tenant would inspect the Crown grant and would discover that he could only have the land upon the terms and restrictions mentioned therein. He would find that his position would be that of a trustee only and that apparently his sole duty would be to hold the property and allow the Agricultural Society to use it. That society might or might not make profits out of its shows held upon the land. But the utmost power which a speculator (suppositious but sane) would possess for recouping himself would be that he might (subject to the approval of the Governor-in-Council which might or might not be given), make regulations for charging entrance fees. Could any man under such circumstances be reasonably expected to pay any rent whatever. Even if the present trustees can be considered as possible tenants would they pay any rent for land which can only be a burden to them. It is possible that the society itself would be willing to pay a rent. But it is not the tenant nor is it the person rated, nor could it be. The property must be vested in trustees to hold upon the terms imposed by statute and by the Crown grant. The trustees are rated and the only possible

hypothetical tenant must be some person who would be willing to take their place and pay a rent. The statute no doubt requires that one should look at all possible tenants, *Reg. v. London School Board*, 17 Q.B.D. p. 738, but they must be reasonable tenants. In my opinion, property tied like this is could have no marketable value to reasonable men and therefore as it must be rated at something the amount should be fixed at the nominal sum of 1s. It has been said that this point has been impliedly decided, against this view, by the English decisions. I do not think it has. It was raised but not decided in the *Owen's College* case (see 18 Q.B.D. at p. 407), and no one seems to have suggested that the question had been previously decided and it must be remembered:—

"That the decisions in these rating cases have been progressive and that in the earlier cases points which might have been raised and decided were not raised" 24 Q.B.D. at p. 209, per L. Esher M.R.

The question for the determination of the Court of General Sessions upon these appeals is the value in the market of the property considering all the terms and restrictions imposed by law and this value is to be arrived at upon evidence. The evidence given for the appellants in the Court of General Sessions upon the hearing of this appeal was in my opinion founded upon an erroneous basis, totally apart from the point in issue and was properly disregarded by the learned chairman. We have been informed however that he gave his decision following this court in the case of *The Trustees of the Victorian Rifle Association v. The Mayor etc. of Williamstown*, 16 V.L.R. 251. That case had been impugned in this argument. I cannot see that it decides any new principle or was ever meant to decide any. It seems to me to be the logical conclusion from the previous decision between the same parties (15 V.L.R. 59.) The first case had decided that in valuing land granted by the crown to any person or corporate body, the municipal council must take into consideration all the restrictions and conditions of the Crown grant. The second case merely says that when the restrictions and conditions of that particular grant were so considered the value of the land to any possible tenant was only nominal. That is all that case decides and decides in my opinion correctly though there are expressions in the judgment which taken by themselves are not strictly accurate. My conclusion therefore is that the decision of the General Sessions was correct.

Solicitors for the appellant council, *Malleson, England and Stewart*.

Solicitors for the respondent trustees, *McKean and Leonard*.

IN CHAMBERS.

(Before Hodges, J.)

MACPHERSON BY HER NEXT FRIEND, HUMK, v. UNION TRUSTEE COY. OF AUSTRALIA, LIMITED.

13th, 18th May.

Administration suit—Infant—Ward of Court—Guardian—Where a testamentary guardian of an infant is

domiciled out of the jurisdiction of the Court, the Court will appoint a co-guardian domiciled within the jurisdiction to act with such testamentary guardian.

Application on behalf of the plaintiff for the appointment of a guardian of the infant plaintiff, Macpherson.

It appeared from the affidavits that the infant plaintiff, Kathleen Purves Macpherson, is the only daughter of the late Mr. Robert Charles Macpherson, of Toorak, who left property amounting to £70,000 and upwards, which under his will devolves upon the child upon her attaining the age of 25 years. Mr. Macpherson died on the 15th August, 1889, and in November of the year following his widow married Mr. George William Barton, then of Sydney. Shortly after their marriage Mr. and Mrs. Barton went to England and settled there. In October, 1891, Mrs. Barton died in London, having previously to her death, by a codicil to her will, appointed her husband guardian of her child, Kathleen Purves Macpherson. In April last Mr. Barton came out to Victoria for the purpose of transacting certain private business, and upon his arrival in the colony he was informed that an administration suit by the infant Kathleen's next friend, Miss Eliza Hume, had been commenced against the Union Trustee Company, the executors under the will of the infant's father, and that the child, by reason of the suit, was now a ward of Court, and that he could not take her out of the colony. Subsequently Mr. Barton took the child to visit her grand-aunt, Miss Eliza Hume, from whose house she was removed to the house of Mr. J. L. Purves, who refused to return her to her stepfather. Mr. Barton opposed the application for the appointment of a guardian, on the ground that he was already the duly-appointed and legitimate guardian of the child, and that it was unnecessary to appoint another.

Dr. Madden, Mr. Topp, and Mr. Coldham appeared for the plaintiff, Eliza Hume; *Mr. Piggott* for the Union Trustee Company, and *Mr. Isaacs* and *Mr. Bryant* for G. W. Barton.

His HONOR, in giving judgment, said:—This application arises out of an administration suit that has been instituted by Kathleen Purves Macpherson by her next friend, Eliza Hume, and the application is for the appointment of a guardian of the infant plaintiff. It appears that the infant plaintiff was born about the 22nd February, 1889, in Victoria, and that her parents' domicile at that time was Victoria; that her father died in Victoria on or about the 15th August, 1889, leaving considerable property here, in which the infant is largely interested; and that his widow married George W. Barton on or about the 3rd November 1890. After this marriage Mr. and Mrs. Barton went to England. So far the facts are not in dispute, but a doubt has been raised as to whether Mrs. Barton was domiciled in England on the 28th September, 1891, the day on which she is alleged to have made the codicil to her will, and the question has also been raised whether that codicil was duly executed. From the circumstances under which she left the colony, from the variances or differences that existed between

her and her friends and connections; from the fact that her husband had resigned his position in Sydney to go with her, from the fact of her saying to Mr. Brett, as I believe she did, that she did not intend to return to Australia, coupled with what took place at home, I have come to the conclusion that she was not merely staying in England, but that she meant to make that country her permanent home; that it was her domicile of choice, and that she had elected to stay permanently in it. And I think that, apart from her return here for temporary purposes, she would have remained there if she had lived. I therefore think that on that day on which the codicil was executed, viz., the 25th September, 1891, Mrs. Barton was domiciled in England. I think, also, that the codicil has been duly executed in the presence of two witnesses present at the same time. I think, also, that Mrs. Barton was at the time of her death domiciled in England, and that she had not at that time any intention of changing her domicile. After her death, which took place in London on 11th October, 1891, Mr. Barton returned to Victoria, bringing with him the infant plaintiff, and I believe his intention was only to remain in Victoria for a short time and then to return to England, and I have no doubt that he intended to take the infant plaintiff with him. This suit was instituted and this application has been made in the course of the suit for the appointment of a guardian. Mr. Isaacs, on behalf of Mr. Barton, contends that inasmuch as this codicil was made in the place of Mrs. Barton's domicile, and inasmuch as by the law of domicile she had power to appoint a guardian, and did appoint her husband as guardian, and inasmuch as by the law of this country a guardian can be similarly appointed, and as Mr. Barton is at present here, this application is not necessary, and cannot be granted. Now I take it as beyond dispute and well established by a series of decisions, that the bringing of an administration suit makes this infant plaintiff a ward of Court, and it is equally well established that when once a person is made a ward of Court that person cannot be taken out of the jurisdiction of the Court without the consent of the Court—not that that person cannot be taken out of the jurisdiction at all or that the Court cannot give leave for such purpose, but such person cannot be taken away without the consent of the Court—and it seems to me on the facts that Mr. Barton would be going, and intends to go, out of the jurisdiction of the Court; and as I must assume that he does not intend to commit an act in contempt of Court, and to take the ward out of the jurisdiction of the Court, it appears to me that if he carries out the intention which he at the present time has, the infant would be left within the jurisdiction of the Court with no guardian within the jurisdiction to whom the Court could look, and through whom the Court could enforce its orders. As I understand the case of *Johnstone v. Beattie* (10 Cl. & F. 42), which was followed by me in *Robertson v. Smith* (16 V.L.R., 566), what the Court requires is that there shall be somebody resident within the jurisdiction of the Court, responsible to the Court, and able to carry out the orders of the Court, and

through whom and by whose means the orders of the Court can be enforced. And the Courts have gone so far as to decide that even where a father has been left guardian to his own child, if the father be resident out of the jurisdiction of the Court, the Court will appoint a guardian other than the father within the jurisdiction, and although the Court will not directly supersede the father, it requires (the father being out of the jurisdiction) someone within the jurisdiction through whom its orders can be enforced, and I cannot think that that requirement is satisfied because the person happens to be within the jurisdiction at the time the application for the appointment of a guardian is made, or at the time the suit is begun. If it were so, it would only be necessary for a person to walk within the jurisdiction and leave it as soon as the application was disposed of. I have therefore come to the conclusion that in this case it will be proper, and I think, on the facts of the case, the necessity for appointing a guardian exists, not only because of the child having been born here, and of its father having been domiciled here, but also by reason of the most substantial part of her property being here. I think, therefore, a guardian ought to be appointed within the jurisdiction. But one having been properly appointed elsewhere he is not to be superseded and to be regarded as a stranger, but as a person with some rights. I think I ought to take the course taken in *Robertson v. Smith*, and refer it to the Chief Clerk to approve a fit and proper person to be appointed as guardian of the child, some person resident and domiciled in this country, who will discharge these duties in conjunction with Mr. Barton, who may be domiciled and resident elsewhere. The costs of all parties (to be taxed) should come out of the estate, the trustees to have their costs as between solicitor and client.

Solicitors.—For the plaintiffs, *Blake & Riggall*; for defendant, *Willan & Colles*; for Barton, *Woolf & Destrée*.

Before Hodges, J.

BONE V. BONE.

20th May.

Marriage Act 1890 (No. 1166) sec. 111—In application under this section the Court has to enquire whether the wife has or has not sufficient separate estate and also what would be a sufficient sum, if she has not such estate to enable her to have the merits of her case investigated; and therefore an affidavit is required not only that the wife has not sufficient estate but also to show circumstances from which the Court can gather what would be a sufficient sum to enable her to have her case investigated.

Application under sec. 111 of the *Marriage Act 1890* on behalf of the wife the petitioner in a suit for dissolution of marriage for an order that her husband the respondent do pay into Court a sum of money sufficient to enable her to have the merits of her case investigated by a proctor.

Mr. Woolf in support.

Mr. Moule to oppose.

HIS HONOR said:—I desire to say a word with regard to applications by a wife under this section. The practice seems to be unsettled but the section requires that the Court shall inquire into the question whether the wife has or has not sufficient separate estate; and also what would be a sufficient sum, if she has not sufficient separate estate, to enable her to have the merits of her case investigated. An affidavit is required to show that the wife has not sufficient estate and I think the affidavit should go on to show circumstances from which the Court could gather what would be a sufficient sum to enable her to have her case investigated; e.g., what has already been done at the time of the application and what in all probability will require to be done by the proctor for the proper investigation or her case. Without such an affidavit I do not see how the Court can estimate what would be a sum sufficient for the investigation and what sum ought to be paid into Court by the husband. In the present application I can see, from what has been mentioned at the bar and from reading the petition, that some further slight investigation may be necessary and I shall therefore order the respondent to pay a small sum into Court for this purpose. I order the respondent to pay £3 into Court and to pay the petitioner's costs of this application which I fix at £2 2s. I certify for counsel.

Proctors, for petitioner *Gaunson & Wallace*; for respondent *Moule & Seddon*.

Before Hodges J.

HERRICK AND OTHERS V. UNITED CLAUDE SILVER MINING COMPANY.

13th, 16th May.

Rules of Supreme Court 1884 Order LXVII. r. 9—Real Property Act 1890 (No. 1136) ss. 125, 180—F. fa—Execution—Land—A sheriff cannot seize and sell property out of the jurisdiction of the Court.

Application on behalf of the plaintiff under order LXVII., r. 9, calling upon the sheriff of the Central Bailiwick to show cause why he should not be ordered to sell the defendant company's interest in certain silver mining leases, situated in Tasmania, under and by virtue of a writ of *fieri facias* of the Supreme Court of Victoria.

It appeared from the affidavit in support that the defendant company's registered office was in Melbourne, that the plaintiffs, who were working miners, had recovered against the defendant company the sum of £155 12s. 6d. with costs for wages, and that on this judgment execution was issued and the sheriff was requested to seize and sell certain silver mining leases possessed by the defendant company in Tasmania, but that the sheriff refused to do so on the ground that this property was situated outside the jurisdiction of the Court.

The arguments appear sufficiently from the judgment.

The clerk to the plaintiff's solicitor in support.

Mr. Anderson to oppose.

HIS HONOR said I will consider the matter.

Hrs HONOR on a subsequent day delivered the

following judgment:—This was an application by the plaintiffs under order LXVII rule 9, for an order directing the sheriff to execute a writ of *fiery facias* upon certain leases in a silver mining company in which the defendants were interested in Tasmania, and for an order that the sheriff should be ordered to sell the defendant's interest in the same. After seizure it was objected on the part of the sheriff that the land, being outside the jurisdiction of the Court, could not be sold by him. In my opinion that contention is good. According to the general principles which govern a sheriff, it is his duty to seize before he sells, and he could not seize land in Tasmania. At one time it was only what might be called a personal estate in land which could be sold by the sheriff. Afterwards a power was given him to sell the fee. Section 180 of the *Real Property Act* 1890, provides that the sheriff may sell land without seizing it. Section 125 of the same act shows what lands are there referred to. It provides that—

"From and after the passing of this act the houses, lands, and other hereditaments and real estates situate or being within Victoria belonging to any person indebted, including an equity of redemption and all interest to which such person is entitled in any houses, lands, and other hereditaments, corporal or incorporeal, and real estates in Victoria, &c., shall be subject to the like remedies, proceedings, and process in any Court of law or equity in Victoria for seizing, extending, selling, or disposing of any such houses, &c., in like manner as personal estates in Victoria are seized, extended, sold or disposed of for the satisfaction of debts."

That shows that the sheriff can only sell such land as may be in Victoria. I cannot find any authority, nor, so far as I know, is there any, that the sheriff can seize and sell property out of the jurisdiction of the Court. I therefore dismiss the summons with three guineas costs. I certify for counsel.

Solicitors for plaintiff *Hobday*; for sheriff, *R. S. Anderson & Son*.

SITTINGS IN BANCO.

(Before Higinbotham C. J. Williams and Hood J. J.)

WHITNEY v. JUSTICES &C. OF FOOTSCRAY.

March.

Explosives Act 1885 (1890)—*The Ammunition Factory Act* 1889.

A general Act is controlled by a special Act relating to the same subject matter, and the provisions of the general Act must yield to those of the special Act in so far as they are inconsistent with them.

The Ammunition Factory Act 1889 ratifies a lease, the terms of which are inconsistent with "The Explosives Act 1885" (reproduced in the Explosives Act 1890), and authorises the erection and carrying on of an ammunition factory free from the means of control created by the last mentioned Act.

(Per Williams J.) *The ammunition factory authorised by the Ammunition Factory Act 1889, is something altogether outside the Explosives Act.*

This was a case stated by the chairman of General Sessions. On the 28th May 1889, a lease of 5 acres of crown land at Footscray was granted to the Colonial

Ammunition Company by the Governor-in-Council for the purpose of erecting a factory thereon for the manufacture of ammunition. The lessees bound themselves to supply to the government a very large number of cartridges on specified terms. They were also at liberty to manufacture ammunition for sale generally. The lease also contained a number of covenants with respect to the carrying on of the business of the manufacture of ammunition and as to the user of the land. In November 1889 *The Ammunition Factory Act* 1889, (Act No. 1022) ratifying the lease was passed, and the company subsequently commenced business. The inspector of explosives, however, insisted that before the manufacture of cartridges could be lawfully commenced the factory must be licensed in accordance with the provisions of the *Explosives Act* 1890, and in April 1891, the company's manager, Captain Whitney, was summoned before the justices of Footscray for manufacturing explosives without having obtained a license for his premises under the *Explosives Act* 1890, and was convicted and fined £5 with £21 costs. From this decision the defendant Whitney appealed to General Sessions and the learned chairman reversed the order of the justices with £15 15s. costs, but consented to state a case for the opinion of the Supreme Court.

Mr. C. A. Smyth for the appellant, (the inspector of explosives) contended that the factory was subject to the *Explosives Act* 1890. That the terms of the lease were in no way repugnant to the provisions contained in the *Explosives Act* and that therefore as *The Ammunition Factory Act* 1889, had not specially exempted the lessees from the conditions imposed by the *Explosives Act* 1890, as to the manufactures of explosives, they were subject to the provisions of it.

Dr. Mulden and Mr. Bryant for the respondent Whitney contended that though *The Ammunition Factory Act* 1889, did not in express words repeal *The Explosives Act* 1885 so far as related to the company's factory it did repeal it by implication as the conditions contained in the lease were absolutely contradictory to many of the provisions of the *Explosives Act*. That it would be impossible for the lessees to carry out the objects and the covenants of the lease if the company was held to be within the provisions of the *Explosives Act*.

Cum ad vult.

March 31st.

THE CHIEF JUSTICE.—Case stated for the determination of the Full Court by the chairman of the Court of General Sessions at Melbourne, under section 139 of the *Justices Act* 1890. The appellant, A. Whitney, was convicted on June 10, 1891, by the Court of Petty Sessions, at Footscray, on the charge of manufacturing ammunition on April 7, 1891, on the premises of the Colonial Ammunition Factory Company, of which he was the manager, such premises not being then licensed under the *Explosives Act* 1890, and he was fined £5 5s. with £21 costs. The Court of General Sessions, on appeal, quashed the conviction, and we have now to determine whether the appellant was rightly convicted. The *Explosives Act* 1885, was

passed to protect the public against the danger arising in the hazardous operations of the manufacture, carriage, storage, and sale of all kinds of explosives. Section 7 prohibited, under heavy penalties, the manufacture of any explosive—a term which includes ammunition of all descriptions—except at a factory licensed for the same under any regulation made under the act. By section 5 (1) power was given to the Governor-in-Council from time to time to make, alter, and repeal regulations for the purpose, *inter alia*, of licensing factories for the manufacture of explosives. Regulations made under this power, and in force at the time of the alleged offence, imposed strict conditions on the issue of a license by the Minister of the Crown administering the act. It was provided by these regulations, amongst other things, that the Minister might reject the application for a license altogether, or might grant to the applicant permission to apply to the municipal council for their assent to the establishment of a factory on a proposed site, and that such assent should be first obtained and forwarded to the Minister in writing before the application for a license should be finally dealt with; and further, that on the preliminary approval of an application for a license the applicant should complete the factory and the arrangements thereof in accordance with the terms of the proposed license, and to the satisfaction of a Government inspector, before the license should be issued. Minute and stringent provisions are made by the act and the regulations for the observance by the licensee of the conditions of the license and for the management of the factory in accordance with specific general rules to secure public safety and convenience in the process of manufacture. Part V. of the act provides for inspection by Government inspectors of magazines and factories. These provisions of the Act of Parliament must be taken to have been known to the Government at the time (May 28, 1889) the lease about to be mentioned was granted by the Governor-in-Council, and to Parliament at the time (November 4, 1889) the lease was ratified by Act No. 1,022. It has been assumed in the argument that the regulations which were put in evidence, though of a much later date, were substantially the same as the regulations in force at the same periods. On the 28th May, 1889, a lease of Crown lands, comprising five acres or thereabouts, together with certain easements, was granted by the Crow to the Colonial Ammunition Company Limited, a company duly registered in England, under the *Companies Acts* 1862-1883, for a term of 999 years, at peppercorn rent. The lessees bound themselves to supply ammunition cartridges to the Government on certain terms; they were not prevented from manufacturing and selling ammunition to other purchasers. The lease contained covenants by the lessees that they would carry on the factory under regulations framed by the lessees or their successors, to be approved by the Minister of Defence; that neither the lessees nor their successors would use the demised premises, or the easements enjoyed therewith under the lease, for any other use or purpose than an ammunition factory; that they would at all times permit and allow

all persons authorised by Her Majesty or her successors or by the Minister of Defence, full access to all and every part of the premises thereby demised, for the purpose of inspection or for any purpose whatsoever; and that they would not sublet or assign the demised premises, or any part thereof, without the permission in writing of the Minister of Defence. The lease was granted upon the express conditions that Her Majesty and her successors, or the Board of Land and Works, its successors or assigns, might re-enter and re-possess the premises for rent in arrear or upon breach of any of the covenants, whether negative or positive, therein contained by or on the part of the lessees. Lastly, it was expressly agreed that the lease was granted by Her Majesty and accepted by the lessees, and that the several covenants and provisions thereinbefore contained on the part of Her Majesty or Her Majesty's Government in Victoria and on the part of the lessees were entered into subject wholly to ratification by the Parliament of Victoria, and that in the event of the Parliament of Victoria not ratifying the granting of the lease within 12 months from the date thereof the lease should be absolutely void and of no effect. The Act No. 1,022 was passed in the same year, on November 4. The preamble recited that it was desirable and expedient that the lease should be ratified by Parliament. Section 2 provided that notwithstanding anything contained in any act relating to lands of the Crown, the lease granted by the Governor-in-Council to the Colonial Ammunition Company Limited, and bearing date the 28th day of May, 1889, together with all rights, powers, privileges, and easements, thereby created and conferred, was thereby ratified and confirmed, and that it should be lawful for the Governor-in-Council to carry out and give effect to the same. The first words of this section suggest that doubts were entertained whether without an Act of Parliament a lease of Crown lands for such a purpose and on such terms could be granted by the Governor-in-Council under the existing *Land Act*. No reference is made to the *Explosives Act* 1885, or to any other act general or special. The appellant relies on the rule of interpretation of statutes that a general act is controlled by a special act, and that the provisions of a general act must yield to those of a special act in so far as they are inconsistent with them. *Attorney General v. Great Eastern Railway Company*, 7 Ch. App., 475, confirmed on appeal, in Law Reports, 6 E. & L. App., 367; *Corporation of Yarmouth v. Simmons*, 10 Ch. Div., 518. It has been argued, and in our opinion the argument has not been answered, that such an inconsistency arises between the *Explosives Act* 1885 and Act No. 1,022 with reference to the subject matter of the conviction in this case. The *Explosives Act* 1885, prohibited the manufacture of ammunition, or the carrying on of the process of such manufacture, except at a factory licensed under a regulation, sec. 7. Regulation 24 made the assent of the municipal council of a factory on the proposed site a condition precedent of the power of the Minister to grant a license for a factory on such site. The Act No. 1,022 ratifying the lease gave legislative authority

to the lessees to erect a factory and to carry on the process of the manufacture of ammunition upon the land contained in the lease. A lease when thus ratified must be regarded, we think, as a Parliamentary license to the lessee to carry on this hazardous business exempt from the necessity of obtaining for the leased site the assent of the municipal council, or a license from the Minister. It has been contended that it could not have been the intention of the Legislature to deprive the inhabitants of this locality of the ample protection provided for them by the *Explosives Act* 1885, and to substitute for that Act, and the regulations under it, such provisions for management, inspection, and control as are contained in the lease. But we cannot speculate upon what the intention of the Legislature may have been. We must only construe the language that is used, and the legislature has, in our opinion, authorised the erection and carrying on of this factory free from the means of control created by the earlier and general act. We have arrived at the determination, but not without some hesitation, that the appellant was not rightly convicted, and that the conviction was properly quashed.

MR. JUSTICE WILLIAMS.—I agree with the judgment of the Court, and in the reasons stated for the judgment; but I desire to state that I was during the argument, and have since remained, free from the doubts which affected, and still seems to affect, the other members of the Court. The view I took during the argument was that this manufactory is outside the *Explosives Act* altogether, and I still adhere to that view. Nor am I so much pressed by the consideration that the placing this manufactory outside the *Explosives Act* renders it a greater source of peril to the locality in which it is situate than would have been the case had it been under the operations of that act. There is a covenant in the lease (which Parliament has ratified, and of which it has expressed approval) providing that the lessees will carry on their business under regulations framed by them, but approved by the Minister of Defence. If the lessees commit a breach of this covenant (which fact may be ascertained by inspection under another covenant in the lease), Her Majesty or the Board of Land and Works may determine the lease by re-entry. It is not to be assumed that the Crown (the lessor) or the Minister of Defence has so neglected its or his duty as to allow this necessarily dangerous business to be carried on either not under regulations, or under regulations which are not reasonably adequate and sufficient to protect life, limb, and property. Assuming, as I am bound to do, that this pressing and momentous duty has not been neglected, I fail to see why, under such regulations, the business of this factory should not be carried on with no greater peril than would have been the case had it been amenable to the provisions of the act mentioned.

Solicitors for the appellant *Guinness*.

Solicitors for the respondent *Gillott, Croker, Snowden & Co.*

(Higinbotham C.J., Williams & Hood J.J.)

ASKEW V. DANBY.

March, 7, 8, 9, 10.

Sale to defeat creditors—Bill of Sale—13 Eliz. ch. 5 Act No. 557—Instruments Act 1890 Part VI.

In order to avoid a sale under 13 Eliz. ch. 5, it is necessary that good consideration shall not have been given and that the person to whom the property is assigned shall not have received it bona fide, but with notice of the fraud of the assignor.

In determining whether a document is or is not a bill of sale the later decisions go to show that the Court will look at the real transaction between the parties and ascertain the actual truth of the case, and will hold that a document, although informal in character, is a bill of sale, if it is shown to be either a muniment of title to the goods, without which there would be no transaction between the parties, or a depository of the final intention of the parties, and therefore necessary to be put in evidence in proof of the transaction.

Act No. 557 (reproduced in the Instruments Act 1890) with the exception of Section 11 applies only to transfers by way of mortgage or security and does not include absolute transfers.

This was a motion for a new trial by the defendant an appeal by the defendant from so much of the judgment as was in favour of the plaintiff and an appeal by the plaintiff from so much of the judgment as was in favor of the defendant. On the 24th December 1889 A. H. Wilkinson sold to George Askew the plaintiff all his business and stock-in-trade and the document by which the sale was effected and under which the plaintiff took possession of the goods and premises absolutely transferred the said business and stock-in-trade for the consideration therein expressed. Shortly afterwards, early in January 1890, Wilkinson voluntarily sequestrated his estate. Immediately after the document of the 24th December 1889 (set out in full in the judgment below) was signed the plaintiff took possession of the purchased property and sold and bought largely in the ordinary course of business until he was stopped by the seizure of the goods in March 1890 by Wilkinson's trustee in insolvency, the father of the present defendant, who subsequently died and the present defendant was elected as the successor in the trust and sold the goods seized by his predecessor. After the seizure of the goods the plaintiff brought the present action and sued the defendant for trespass in entering and taking the goods, in trover for the conversion of the goods and in detinue for the detention of certain trade books. The defences set up by the defendant were first that the sale to the plaintiff by Wilkinson was a sham sale; Secondly that it was fraudulent and void under 13 Eliz. Ch. 5; Thirdly that it was fraudulent and void under section 71 of the *Insolvency Statute* 1871, in that it was a fraudulent preference of one Burkitt a creditor of Wilkinson, and fourthly that the alleged sale was not made in the ordinary course of business and the document of the 24th December 1889, whereby it was effected was a bill of sale invalid by reason of

non-registration. The action was tried before Mr. Justice a'Beckett and a jury of six and at the close of the case the following questions were submitted to the jury.

1. Was the alleged sale by Wilkinson not a real but a sham sale, not intended by either Wilkinson or the plaintiff to pass the property or any of it to the plaintiff?

2. Was the alleged sale made by Wilkinson, as the plaintiff knew, at a time when Wilkinson was greatly indebted and for the purpose and with the intention of defrauding, defeating, and delaying the creditors of Wilkinson and without any valuable consideration?

3. Was Wilkinson at the time of the alleged sale, as the plaintiff and Burkitt well knew, unable to pay his debts as they became due from his own money and was the alleged sale made in favour of plaintiff in trust for Burkitt, and as Burkitt then well knew of giving Burkitt a preference over the other creditors?

4. Assuming that the plaintiff is entitled to damages for the seizure and sale of goods bought and paid for after the purchase from Wilkinson, what damages do you give for the seizure of such goods?

5. Do you find that any of the goods seized by the defendant were goods which had been bought on credit and not paid for at the time of the seizure?

6. If you answer yes to question five what damages do you give for the seizure and sale of such goods?

7. What damages do you give for the seizure of the trade books bought by the plaintiff?

8. If you answer questions one, two, and three in favour of the plaintiff what damages do you give in addition to the damages under questions four, five, six, and seven?

9. Were the goods bought by the plaintiff after the sale by Wilkinson distinguishable by the defendant from those included in the sale by Wilkinson.

10. Were the goods bought by the plaintiff after the sale by Wilkinson distinguishable by the plaintiff from those included in the sale by Wilkinson.

11. Was the plaintiff offered by the defendant an opportunity for distinguishing and removing the goods so subsequently bought before the defendant sold than with the other goods?

12. Had the plaintiff's tenancy of Bradford House been determined by operation of law when the defendant seized in November 1890?

13. If you say No to question twelve what damages do you give for trespass in entering Bradford House?

To the above questions the jury returned the following answers.

In answer to questions one, two and three we think that it was a real and not a sham sale and was for valuable consideration and was not in trust for Burkitt.

In answer to question four; £1000 damages.

In answer to question five; Yes.

In answer to question six; £475 damages.

In answer to question seven; £1 damages.

In answer to question eight; £3800 damages.

In answer to question nine; No.

In answer to question ten; Yes.

In answer to question eleven; No.

In answer to question twelve; Yes.

Upon these findings the plaintiff moved for judgment for £5276 with costs but His Honour held that the plaintiff was not entitled to the £3800 found by the jury to be the value of the goods taken possession of by the plaintiff under document of the 24th December on the ground that such document was a bill of sale requiring registration and His Honour entered up judgment for the plaintiff for £1475 with costs of action except the costs of the issues on which the defendant had succeeded which costs the plaintiff was directed to pay to the defendant, and the defendant was directed within one month to deliver to the plaintiff the books purchased by the plaintiff after the 24th December 1889. From the judgment the defendant appealed and also moved for a new trial. The plaintiff also appealed.

Mr. Topp and Mr. Isaacs, appeared in support of the motion, and for the defendant appellant.

Dr. Madden and Mr. Irvine, appeared to oppose the motion and for the plaintiff respondent.

Cur. ad. vult.

April 8th.

THE CHIEF JUSTICE.—A motion by the defendant for a new trial, an appeal by the defendant from the judgment of the learned primary judge in favour of the plaintiff awarding him £1,475 and the general costs of the action, and an appeal by the plaintiff from a portion of the judgment, have by consent been argued together. The plaintiff was the transferee under a document dated December 24, 1889, whereby, in consideration of the sum of £5,325 to be paid by him, one A. H. Wilkinson purported to sell and transfer to the plaintiff all his stock-in-trade, goods, fixtures, and chattels upon the premises known as Bradford-house in North Fitzroy, where Wilkinson carried on the business of a draper. The defendant on October 28, 1890, became trustee in insolvency of the estate of Wilkinson. The plaintiff sued the defendant on three counts. For trespass in entering and taking his goods, in trover for the conversion of his goods, and in detinue for the detention of the books used in the business. The defendant set up four distinct defences to the whole action. He pleaded, first, that the sale on December 24, 1889, was not a real but a sham sale; secondly, that the sale was fraudulent and void under 13 Eliz., ch. 5, as it had been made for the purpose and with the intention of defrauding, defeating, and delaying the creditors of Wilkinson, and without any valuable consideration; thirdly, that the transfer was fraudulent and void within section 71 of the *Insolvency Statute* 1871, as it was made to and in favour of the plaintiff in trust for Burkitt, a creditor of Wilkinson, with the view, as the plaintiff and Burkitt then well knew, of giving Burkitt a preference over the other creditors; and, fourthly, that the alleged sale was not made in the ordinary course of business, and that the document whereby the sale took place was never registered as a bill of sale under the provisions of *The Instrument and Securities Statute* 1864 and the Act No. 557, and was therefore wholly inoperative and invalid. We proceed to deal with the motion, and the

several appeals in the order in which they have been presented to us and argued. The motion by the defendant for a new trial has been supported on six grounds. These involve the consideration of one or more of the answers given by the jury to the 13 questions submitted to them by the judge. First, it has been contended that the verdict and the findings of the jury adverse to the defendant are against evidence and the weight of evidence. This contention was pointed in argument to the special finding that the sale was a real sale, and to the finding, included in the verdict, that though Wilkinson and Burkitt may have been dishonest in the part they took in the transaction the plaintiff Askew was honest, and did not know that they were dishonest. We have intimated in the course of the argument that the case could not, in our opinion have been withdrawn from the jury upon either of these grounds. There was sufficient evidence to show that the sale, apart from the question of the *bona fides* of the parties to it, was a transaction which all the parties intended to carry into effect; that Askew was not a mere tool of Wilkinson and Burkitt, and that in this sense the sale was a real and not a sham sale. The evidence as to the honesty or *bona fides* of the plaintiff was much less satisfactory. His share in the transaction was open to grave suspicion, and it called for, and we have no doubt that it received, due consideration from the jury; and we are not prepared to say that the jury could not, as reasonable men, have found that the plaintiff in this transaction was honest. He was suddenly tempted by an advantageous offer which he had to accept or reject with little time for consideration, and, although he must have known that he was required to pay for the stock less than it was actually worth, it is possible, that he may have thought that the interests of the creditors would be safer if the business were in his hands as proprietor rather than in Wilkinson's. He had to pay the bills that were to be endorsed by Burkitt, and he may have believed that he would be able to pay them as they became due out of the proceeds of the business, and that Wilkinson would, like any other honest debtor, apply the proceeds of the bills, as they were paid, to satisfy the claims of his creditors. We do not say that we should have found as the jury have found on this question, but we cannot say that the jury have been clearly and unmistakably wrong in their finding. Under this head it was further contended by Mr. Topp that there was no evidence to support the finding of the jury on the 11th question, namely, that the plaintiff was not afforded by the defendant an opportunity for distinguishing and removing the goods bought subsequently to the purchase from Wilkinson before the defendant sold them with the other goods. We are inclined to agree with this contention, but it is unnecessary to determine the question in view of our decision on the plaintiff's appeal, by which the question and the answer alike become immaterial. 2nd. It is said that the learned judge misdirected the jury with respect to the goods bought and paid for since December 24, 1889, out of the proceeds of the goods bought by the plaintiff from Wilkinson on that day. This ground was given up

as a ground of motion for a new trial as the damages were assessed contingently at £1,000. 3rd. This ground of motion for a new trial for misdirection fails for the same reason. The jury have assessed the plaintiff's damages contingently at £475, and the question is disposed of by our decision upon the defendant's and the plaintiff's appeals. 4th. This ground of motion for a new trial resolves itself into an objection to the sufficiency of the answer given by the jury to the following portion of the second question, "Was the alleged sale made by Wilkinson, as the plaintiff knew, at the time when Wilkinson was greatly indebted, and for the purpose and with the intention of defrauding, defeating, and delaying the creditors of Wilkinson?" Questions one and three have been answered. This part of question two, it is said, has not been answered, and there has been consequently a mistrial. The question was put with reference to so much of the defence as rested on the statute 13 Eliz., ch. 5. By section 6 of that act it is provided that the act shall not extend to alienations of property made on good consideration and *bona fide* to any person not having notice of the fraud. It has been held accordingly that under this act a mere intention to defraud, defeat, or delay creditors is not sufficient to avoid a sale of property made with such intention—*Wood v. Dixie*, 7 Q.B.D., 892, *M'Nally v. Jack*, 11 V.L.R., 740—and, therefore, in a case under the statute where the judge left it to the jury to say whether the bill of sale was a real *bona fide* transaction or a mere sham, the direction was held to be sufficient—*Darvill v. Terry*, 6 H. and N., 807, 30 L.J. Exch., 355. In order to avoid the sale it is necessary that good consideration shall not have been given, and that the person to whom the property is assigned shall not have received it *bona fide* and with notice of the fraud of the assignor. In the present case the jury have found that the contract was for valuable consideration, and they came into court and asked the judge the pertinent question, "If Askew was honest, but Wilkinson and Burkitt were dishonest, would that make it a bogus sale?" The judge properly answered, "No, if he were honest and did not know that they were dishonest." This question and answer, followed by a verdict in favour of the plaintiff, must be taken, we think, to supply the omission of the jury to return an answer to the portion of the second special question on which this ground of the motion rests. The jury have found, and as we have already held, on sufficient evidence, that Askew was not a party to the fraud, if any, intended by Wilkinson and Burkitt. It is evident that the jury, before they returned their brief answer to questions 1, 2 and 3, found it necessary to consider, and did consider, the question of Askew's *bona fides*, and that they determined it in his favour. That they intended their answer to include a finding on this point is further shown by the fact that the answer was received without objection or comment by the judge and the counsel on both sides, although objections were taken to some of the other answers. 5th. The misdirection alleged as the fifth ground of motion for new trial depends upon the result of the appeal upon the question whether the

document of December 24, 1889, is a bill of sale or not. The sixth and last ground of motion for new trial is the alleged misdirection of the judge in telling the jury, after they had partially answered the questions submitted to them and were re-directed as to damages, and before they had finally delivered their verdict or findings, that they had no right and were not at liberty to re-consider the whole of the questions and their answers. The learned judge has informed us that this objection is founded on a mistake as to what actually occurred at the trial, and that he merely advised the jury, in reply to a question put by one of them, not to re-open the consideration of independent questions on which they had already arrived at a conclusion. We are of opinion, for the reasons above stated, that the motion for a new trial has not been sustained on any of the grounds stated. The defendant also appealed against the judgment of the primary judge, and moved that so much of the judgment as adjudged that the plaintiff should recover against the defendant the sum of £1,475, and costs of the action might be reversed, and that judgment should be entered for the defendant, with costs of the action and of the appeal. This appeal relates to the two sums of £1000 and £475 referred to in the second and third grounds of the defendant's motion for a new trial. This appeal fails as to both these sums by reason of our decision upon the plaintiff's appeal. The question of commixture of goods raised and argued on this appeal also fails for the same reason, and the appeal will be dismissed. We now pass to the plaintiff's appeal. The document of the 24th December, 1889, which was put in evidence and relied on by the plaintiff as a contract of sale of the goods, was in the following terms:—

"Melbourne, 24th December, 1889,

"In consideration of the sum of £5,325 to be paid to me, as hereunder mentioned, by George Askew, of North Fitzroy, draper, I do hereby sell, assign, and transfer to him all my stock-in-trade, goods, fixtures, and chattels in, upon, and about my premises, known as Bradford-house, 165 St. George's Road, North Fitzroy. Payments to be made as follows:—£500 cash. Balance by approved bills in equal amounts at 1, 2, 3, 4, 5, and 6 months, with interest at 6 per cent.—A. H. Wilkinson. Witness, M. J. S. Gair.

"Received from Mr. Askew the sum of £500 above expressed to be paid.

(Stamp)

"A. H. Wilkinson."

This document was undoubtedly the foundation of the plaintiff's title to the goods; without it there would have been no transaction between the parties. The plaintiff's possession taken on the same day was possession taken under the contract. It was conceded that assuming (which, however, was not admitted, but denied) that this document was an assurance of personal chattels within the meaning of Section 56 of the *Instruments and Securities Statute 1864*, the facts did not bring the document within the consequences following under that section upon non-filing. But it was contended for the defendant that the document came within the provisions of section 1 of Act No. 557, and that not having been filed it was consequently inoperative, and had no validity in law or in equity. The primary judge, following an earlier decision of his in

McCarthy v. Nicholls, 8 A.L.T. 180, agreed with this view, and he held that the plaintiff was not entitled to the £3,800 which was found by the jury to be the value of the goods taken possession of by the plaintiff under the document. The plaintiff appeals from this decision, and it has been contended on his behalf that the Act No. 557 does not apply to an instrument like this, which is an absolute transfer, but only to such instruments of transfer which are made and given as securities for advances. In considering this important question, our attention has been properly invited to the general and the distinctive policy of the special provisions of the two enactments part vii., Bills of Sale, of "*The Instruments and Securities Statute 1864*" and Act No. 557. The first of these is a copy included in a consolidating act of an earlier Victorian Act No. 141—"An Act to Prevent Frauds upon Creditors by Secret Bills of Sale of Personal Chattels"—which was passed in the year 1862, and was itself in greater part a copy of the English Act, 17 and 18 Vict., c. 36. The chief purpose of this earliest English and Victorian legislation was undoubtedly to prevent the acquisition of false credit by persons who had parted absolutely or conditionally with their property, but were allowed to remain in possession of it. The particular evil for which this remedy was provided by the Legislature was the practice by which money-lenders, by means of secret bills of sale, obtained a title to, and a ready means of taking possession of, the property of their debtors, who were allowed to continue in apparent or ostensible possession so long as they paid high interest on their debts to this particular class of their creditors. Part vii. of "*The Instruments and Securities Statute 1864*," section 56, required that "every bill of sale of personal chattels made either absolutely or conditionally or subject or not subject to any trusts, and whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale, or at any future time to seize or take possession of any property and effects comprised in or made subject to such bill of sale. . . ." should be filed, together with the schedule of inventory, and an affidavit within ten days (extended to 31 days by Act No. 557, section 11) after the making or giving thereof. Section 63 enumerates instruments which are, and other instruments which are not, included in this definition of a bill of sale. A great many decisions have been given on the question continually arising as to what instruments require registration under this enactment. The Legislature appears to have intended to deal only with cases where the grantor remained in possession of the goods. Accordingly it was observed in *Cohen v. M'Gee*, 4 V.L.R. (L.), 552, that the original act was obviously never intended to apply to cases where the vendor parted with the possession of the goods. This decision has never been overruled, though the observations now cited from it were questioned in *McCarthy v. Nicholls*, 8 A.L.T., 180. On the other hand it is clear from the terms of the definition that absolute transfers in cases where possession remains with the grantor, as well as transfers by way of mortgage or security, come within

the definition of a "bill of sale" in section 56. The later decisions go to show, that the Court in determining whether a document is or is not a bill of sale, will look at the real transaction between the parties and ascertain the actual truth of the case, and will hold that the document, although informal in character, (*Glen v. Abbott*, 6 V.L.R. (L.) 483), shall be deemed to be a bill of sale, and to require registration if it is shown to be either a muniment of title to the goods without which there would be no transaction between the parties, or to be the depository of the final intentions of the parties and therefore necessary to be put in evidence in proof of the transaction—*Young and Others v. Mook Ah Meng*, 17 V.L.R., 12 A.L.T., 206; *Yarnton v. Taylor*, 13 V.L.R., 903; and *Newlove v. Shrewsbury*, 21 Q.B.D., 41. The purpose of the Legislature in passing the original enactment was carried out by the provision that all bills of sale within section 56 should be filed within 10 days (now 31 days) after the making or giving thereof, and that if not so filed the bill of sale would be null and void to all intents and purposes whatsoever as against assignees in insolvency, trustees for the benefit of creditors, execution creditors, and officers executing process for them so far as regards the property in or right to possession of the goods comprised therein which at or after the time of the sequestration or assignment for creditors of the debtor's estate, or of the execution of process, and after the expiration of the period of 10 days (now 31 days) should be in the possession, or apparent possession, of the person making the bill of sale, or of the person against whom the process should have issued. Such were the object and scope of the provisions of the original enactment contained in Part VII., of "*The Instruments and Securities Statute 1861*". The means of evading this law were soon discovered by money-lenders, against whose operations the law was mainly directed. The practice grew up both in England (see *Marples v. Hartley*, 1 Best and Smith 1, 30 L.J., Q.B., 92) and in Victoria (see *Hedrick v. Commercial Bank*, 1 A. Jur. 155) by which the bill of sale was constantly renewed before the time of protection had expired, thus avoiding the necessity of registration altogether, while preserving the secrecy of the transaction. This evasion had to be stopped, and it is necessary to bear in mind in considering the Act No. 557, passed in the year 1876, that it was with the object of stopping this evasion by amending the system of registration that this second Act was passed. Such being the object of Act No. 557, it has been argued for the plaintiff that the intention of the Legislature was limited to effecting that object, and that the provisions of the act do not include absolute transfers, as was contended for the defendant, but apply only to transfers by way of mortgage or security. Section 1 of Act No. 557 is in the following terms:—

"No bill of sale executed after the coming into operation of this act shall be operative or have any validity at law or in equity until the same shall be filed in manner provided by section fifty-six of the Instruments and Securities Statute 1864, and no such bill of sale shall be so filed unless notice of the intention to file the same be lodged at the office of the registrar General fourteen days before the filing thereof, and upon such lodgment there shall be paid to the registrar General a fee of one shilling."

The terms of this section are wide, and taken by themselves they appear to embrace every bill of sale within the definition of the previous act, and must therefore include (except where, as is provided by section 63 of the original act, there is something in the subject or context repugnant to such construction) bills of sale by way of absolute transfer. The notice of intention to file a bill of sale provided for by this section is a new feature of this act. The form and contents of the notice are provided for in the second section and the first schedule. The form of notice distinctly points, in the column headed "Consideration," only to cases where the bill is given by way of security. The words of the notice itself, "to secure the debt or advances abovementioned," point to the same conclusion. As the notice is essential to the validity at law or in equity of any bill of sale executed after the coming into operation of the act, and as the form of notice of intention to file an absolute transfer would involve a substantial alteration of the prescribed contents and form of the notice, it would be impossible to give a good notice of intention to file any bill of sale, except a bill of sale to secure a past debt or present or future advances. Section 3 provides for the keeping of a book by the registrar-general distinct from the books directed to be kept under the first act, section 59, of all persons making or giving any bill of sale specified in such notice. Sections 4 to 10 provide means by which creditors are enabled to prevent the filing of a bill of sale until their just claims at law or in equity are satisfied. Section 11 provides that the period of 10 days, within which bills of sale are by section 56 of "*The Instruments and Securities Statute 1864*" directed to be filed, shall be extended to 31 days as to any bill of sale executed after the coming into operation of Act No. 557. This seems to apply to all bills of sale under both acts. Section 13 is in the following terms:—

"Every bill of sale heretofore made or given otherwise than under or in execution of any process shall at the expiration of twelve months after the coming into operation of this act, and every bill of sale otherwise than as aforesaid which shall hereafter be made or given, shall, at the expiration of twelve months from the filing thereof, become null and void unless within that time an affidavit shall be filed, made by the person or one of the persons entitled to the money secured thereby, or in the case of a corporation by its manager or other officer able to depose of his own knowledge as to the amount owing on the security thereof (such affidavit to be filed within seven days from the day of swearing the same) stating the amount owing on the security thereof at the date of swearing the affidavit, and at the expiration of twelve months from the filing of any such affidavit, or of any subsequent affidavit, such bill of sale shall, in like manner, become null and void, unless a like affidavit is filed within such further period of twelve months, showing the amount then owing on the security of such bill of sale."

It was argued by Mr. Isaacs that this section must be held to apply to bills of sale under the first act, whether absolute or by way of security, as it excepts one and only one of the modes of absolute transfer mentioned in the first Act, namely the transfer "under or in execution of any process," words which are evidently copied from section 56 of the first Act. This exception, it is said, would be unmeaning or un-

necessary if the words in this section, "every bill of sale," relate only to securities. But it had to be admitted by Mr. Isaacs that the enacting effect of this section is only applicable to bills of sale given by way of security, and that the first words of the section must be read in respect to the enacting effect as meaning "every bill of sale to secure the payment of money." It is perfectly plain that the requirements of this section could not be complied with by the grantee of an absolute bill of sale by which no money was secured, as for example, a declaration of trust based on the consideration of natural love and affection. Such a bill of sale, if it comes within the section at all, would necessarily become null and void at the expiration of 12 months from the first filing. We cannot believe that it was the intention of the Legislature that all such documents should be void for non-compliance with a statutory provision which it would be impossible to comply with. The new provision in section 15 of the Act, avoiding contracts of sale and of letting or hiring of chattels, unless both contracts are in writing and filed within a certain time, indirectly supports the same view of the general intention of this Act, No. 557. According to the defendant's contention, an absolute transfer, where possession is given, must be filed, and notice of intention to file must be given, whereas in the case of a contract of sale and of letting or hiring, where the goods may be retained by the vendor, or may be taken back within an hour after they are sold, all that the Act requires is filing without notice. Section 17 provides that the Act No. 557 is to be construed with and is part of Part VIII. of "*The Instruments and Securities Statute 1864*." If these two Acts are to be read as one, as they now appear in the consolidating Act, the *Instruments Act 1890*, Part VI., the difficulty is raised that we have to put a limitation upon the words "bill of sale" in one part of the Act which we do not put upon the same words in the other parts of it. It is plain that section 13 of Act No. 557 must be limited in this way, and a reference to the first schedule of the later Act, and the two sections, 2 and 13, as well as to the distinct historical origin of the two parts of what must be read as one Act, seems to show us that the Legislature intended that the same limitation should be put upon all the sections, except section 11, of the one Act, which are comprised in, or taken from the Act 557. This view leaves section 56 of the earlier act in operation as regards bills of sale other than those given by way of security, whereas, if we were to admit the defendant's view, it would render the latter half of section 56, beginning with the word "otherwise," mere surplusage. The defendant's contention as to the intention of the Legislature in passing the Act No. 557 was that the creditors were to be protected from any transfer by a debtor of his goods, otherwise than in the specially excepted cases by giving them an opportunity of stopping such transfer. We cannot believe that such was the intention, for in addition to reasons already mentioned it is clear that such intention, if it existed, has not been carried out. There is nothing according to this view to hinder the debtor from parting with his goods

by a verbal contract, and it would be a strange result if the Legislature hindered written transfers of property while it allowed verbal transfers to go untrammelled. The defendant's contention would also undoubtedly interfere with every-day transactions, unless in the ordinary course of business, as it would require the filing of a bill of sale of every contract of sale, even though followed by immediate possession and payment of the purchase money. The plaintiff's contention, on the other hand, as to the intention of the Legislature disturbs fewer transactions, while it protects creditors from all transfers of property where, as a rule, possession would remain in the transferror. Except in the case of a pledge, which is admittedly not within the act, it is not easy to conceive a case in which possession would not remain in the transferror, where the transfer is given by way of security. It is more reasonable, in our opinion, to conclude that what the Legislature intended to prevent was the constant renewal of securities by way of a fresh bill of sale, and that it did not intend to interfere with the very common case of absolute transfers. We are of opinion, therefore, that the act No. 557 does indirectly what the later English act of 1882 has done expressly, when it excludes from its application all bills of sale other than those given by way of security. The motion by defendant for a new trial, and the appeal by the defendant from the judgment below will be dismissed, with costs. The plaintiff's appeal will be allowed with costs, and the judgment appealed from will be varied by increasing the amount of damages awarded by £3,800.

Solicitors for the plaintiff, *Brahe and Gair*; solicitors for the defendant, *Braham and Pirani*.

(Before Higinbotham, C.J., Williams and Hood, J.J.)

GURDEN v. BROWN.

March 17th.

Burden of proof.

The plaintiff was on the 17th October 1888 the registered holder of 1,000 shares in David Munro and Co., and on that day he instructed his brokers to sell the shares, and for the purpose of facilitating business the shares were transferred to one O'Hanlon, a clerk in the broker's office, who was also registered as the holder of a number of other shares in the same company. None of the shares in this company were numbered or otherwise distinguishable one from the other. O'Hanlon was a minor and therefore irresponsible. On the same day October the 17th the defendant purchased from O'Hanlon 100 of the plaintiff's shares receiving a blank transfer of them which he delivered to the purchasers to whom he sold the shares a few days after he purchased. The remaining 900 shares appeared by the register to have been transferred to different purchasers between October the 23rd and the 31st 1889. On July the 9th 1890 100 of the shares transferred by the plaintiff to O'Hanlon were by order of the Supreme Court retransferred by O'Hanlon to the plaintiff and the plaintiff as registered owner of these 100 shares was compelled to pay two calls on them amounting to £50

and he brought an action in the county court to recover this amount as money paid to the defendant's use but was nonsuited on the ground that there was no evidence to identify the shares on which the plaintiff had to pay the call with the 100 shares sold to the defendant.

Held on appeal that the plaintiff having proved that the transfer of 900 of the shares had been registered and that none of them were registered in the defendant's name coupled with proof that he had been compelled to pay the call on the remaining 100 was sufficient evidence to launch the plaintiff's case.

*Held also that if the defendant had obtained a registration of the shares purchased by him into the name of his transferee or nominee that that would be a matter entirely within his own knowledge and that he would therefore have to prove it in order to rebut the plaintiff's *prima facie* case and the judgment of nonsuit was set aside and judgment entered for the plaintiff subject to the defendant desiring a new trial. The facts appear in the judgment.*

Mr. Isaacs for the plaintiff appellant.

Mr. McArthur and Mr. Wasley for the defendant respondent.

Cur. ad. vult.

March 31st.

Appeal from the County Court. The action was brought for money paid by the plaintiff for the defendant for calls due on 100 shares in D. Munro & Co. Ltd. purchased by the defendant as a broker on Oct. 17th, 1888. The plaintiff as the registered owner of the shares, was compelled to pay two calls of 5/s. each amounting to £50. The learned judge found as a fact that the identity of the shares sold to the defendant, and those on which the plaintiff paid the calls, was not proved and he accordingly nonsuited the plaintiff, with costs. The plaintiff now appeals from that decision. The facts of the case are very obscure. It appears that the plaintiff was the owner, on October 17, 1888, of 1000 shares in this Company. The first call had been made on October 11, 1888, payable on November 8. On October 17, the plaintiff instructed his brokers, Messrs. Willder and Griffiths, to sell his 1000 shares, and they were transferred on October 22 by the plaintiff, acting under his broker's advice, into the name of O'Hanlon, a clerk in the brokers' office who was a minor, and therefore irresponsible. This was stated to be a general practice and adopted "to facilitate business." O'Hanlon became registered for these shares and also for the shares of other vendors amounting in all to 1500, according to one witness, or to 1660, according to another witness. None of these shares belonging to different owners appear to have been numbered or to have been otherwise distinguishable from one another. The defendant bought 100 of the plaintiff's 1000 shares from O'Hanlon on October 17, receiving a blank transfer of them which he delivered to the purchasers to whom he sold the shares a few days after he bought them. The register of the Company's shares was produced. It showed that 100 of the 1000 shares transferred by the plaintiff to O'Hanlon on October 17, 1888, were retransferred, by order of the Supreme Court, by O'Hanlon to the plaintiff on July 9, 1890. The re-

maining 900 appeared on the register to have been transferred between October 23 and October 31, 1888, to different purchasers, one of whom, Atkins, was the purchaser of 100. There was evidence that a person named Wilton also bought 100 shares in the Company from O'Hanlon some time in October, 1888. It was argued for the defendant that it was impossible on this evidence to identify the plaintiff's 100 shares sold to defendant, and that the plaintiff had consequently failed in the proof necessary to support his case. We do not concur in this view. The plaintiff proved that the transfer of 900 shares had been registered, and none of those were registered in the defendant's name. The register showing this, coupled with proof that the plaintiff had been required to pay the calls on the remaining 100 shares was sufficient, we think, to launch the plaintiff's case against the defendant. More than this, the plaintiff could not prove. The register was *prima facie* evidence that the defendant had not done his duty. He was bound, as the purchaser, to get himself or his transferee or nominee registered as the proprietor of the 100 shares he had bought; until he did so, the plaintiff would remain liable for calls on these shares. In *Ward's Case*, L.R., 2 Ch. Ap. at p. 438, Lord Cairns says: "On the 15th June 1863 Ward sold these 'thirty shares to Stafford through Henry, a broker, and on the following day executed a transfer to 'Stafford in the usual form. There is no doubt that 'this transaction constituted Stafford in Equity the 'owner of the shares; that it was the duty of Stafford 'as between himself and Ward to have taken in the 'transfer to the company and to have had his name 'substituted for that of Ward on the register, and 'that Ward could have compelled Stafford to perform 'this duty and to indemnify him, Ward, against any 'loss occasioned by his remaining the registered owner 'of the shares. This decision has been followed in *Skinner v. London Marine Insurance Corporation* (14 Q.B.D. 882), and the same principle has been frequently affirmed, the only qualification that has been introduced being that laid down by Blackburn in *Mastel v. Paine* (L.R. 6 Ex. at p. 152) to the effect that while it is the duty of the purchaser to get the transfer registered so as to relieve the vendor from future liability, yet he is not bound when the transfer has been signed in blank to have his own name inserted as transferee. He may in such a case take the shares in the name of a nominee. If the defendant in the present case had obtained a registration of the shares into the name of his transferee or a nominee that would be a matter entirely within his own knowledge and one about which the plaintiff would be totally ignorant, and the defendant would therefore have to prove it. He, however, gave no evidence on the point, and the plaintiff's *prima facie* case was accordingly left untouched. The decision of the learned judge was, therefore, in our opinion erroneous. The appeal will be allowed, with costs. The judgment of nonsuit, with costs, will be set aside. Judgment will be entered for the plaintiff for £50, with costs, in the court below unless the defendant signify in writing to the pro-

thonotary within seven days from this date his desire that there shall be a new trial. If he do so, the case will be reheard before a judge of the Supreme Court, and the costs of the first trial will be in the discretion of the judge at the second trial.

Solicitors for the plaintiff appellant, *Manton*; solicitor for the defendant respondent, *Coburn*.

(Before Higinbotham, C.J., Williams and Hood, J.J.)

GRIGG V. BENNETT.

March 18th.

Debtors summons—Imprisonment of Fraudulent Debtors Act 1890, schedule IV. form I.

Form I, schedule IV. of the Imprisonment of Fraudulent Debtors Act 1890 is defective in that it does not state the day on which the debtor is to appear to answer the summons, and unless the debtor does in fact appear in answer to such defective summons no order can be made against him.

This was a motion to make absolute an order *nisi* to review a decision of justices. On the 4th June 1891 the justices at Drysdale Petty Sessions on the complaint of William Henry Grigg made an order against Mark Bennett for the payment of the sum of £6 2s. 10d. The defendant neglected to pay the amount and on the 20th July he was served with a debtors summons in the form contained in Form I, 4th schedule *Imprisonment of Fraudulent Debtors Act 1890*. On the 23rd July the summons was called on but the defendant did not appear and an order of commitment was made against him. The defendant then obtained a rule *nisi* to review this decision upon several grounds one of which was that the summons delivered to him did not state any day for appearance in answer thereto.

Mr. Anderson moved the rule absolute.

Mr. Power showed cause. Section 22 of the *Imprisonment of Fraudulent Debtors Act 1890* says that "the person making default may be served with a summons in the form in the 4th schedule." The summons served in this case followed that form. [WILLIAMS, J. The objection seems to me to be fatal. The schedule is clearly defective. How could the debtor attend when he is not informed when he is to attend.] Having been served with the summons he should have enquired when it would be heard.]

THE CHIEF JUSTICE. We think that this objection is fatal. The order will be made absolute with costs.

Solicitors for the defendant appellant *Davies, Price and Wighton*; solicitors for the complainant respondent, *FitzGerald* for *Litchfield*

(Before Higinbotham C.J., Hodges and Hood J. J.)

REGINA V. MORCE AND HOLLY.

April 7th.

Verdict—Recommendation of jury and reasons therefor no part of finding—Crimes Act 1890, s. 196.

Two prisoners were presented under section 196 of the Crimes Act 1890, for "unlawfully and maliciously setting fire to a fence." The jury returned a verdict

of "guilty with a recommendation to mercy on the ground that there was no malicious intent."

Held, on motion for a rule calling on the learned judge who presided at the trial to state a case for the opinion of the Full Court that the recommendation of a jury or the reasons given for it formed no part of their finding.

Held also that the jury must be understood to have meant an absence of some malicious intent not inconsistent with the malice which necessarily formed part of their verdict of guilty.

This was a motion to make absolute a rule *nisi* calling on a'Beckett J. and the Attorney-General to shew cause why a certain question of law which arose at a criminal trial over which the learned judge was presiding should not be reserved for the opinion of the Full Court. John Morce and George Holly were presented before a'Beckett J. under section 196 of the *Crimes Act, 1890*, which provides that—

"Whosoever shall unlawfully and maliciously set fire to any fence of any description whatsoever shall be guilty of felony and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding seven years."

The jury returned a verdict of "guilty with a recommendation to mercy on the ground that there was no malicious intent." The verdict was returned late in the afternoon and early next morning upon the opening of the court counsel for the prisoners asked the learned judge if he did not think the verdict equivalent to an acquittal but the learned judge was not of such opinion as he said that he considered the action of the prisoners "wilful." Counsel for the prisoners then asked the learned judge to state a case for the opinion of the Full Court but the learned judge refused to state a case, and the present rule *nisi* was then obtained.

Mr. Fisher moved the rule absolute.

Mr. Donovan showed cause. First, as to whether the application to the learned judge was in time. It was not made until the morning following the trial. If it had been made as soon as the verdict was returned and before the jury was discharged it might have been cured. Section 485 and section 481 of the *Crimes Act 1890*, must be read together as to the time when the application must be made and section 381 states that the questions of law must arise at the trial. [HIGINBOTHAM, Yes the question must arise on the trial but may not the application be made afterwards.] In the present case the circumstances no doubt arose at the trial but no question of law arose until a case was asked to be stated which was not until the day following the trial. [HOOD J. It seems to me there ought to be some limit otherwise an application might be made 10 years after.] *Ricetson v. Bouchier* 16 V.L.R. 468 deals with the words "at the trial". The application should have been made either at the trial or immediately afterwards. On the facts the word "guilty" shows that the jury found that the prisoner had done the act and that it was unlawful; what they meant by the words "no malicious intent" was that the prisoners had no personal spite against the owner of the fence,

but that is not an element in the offence under this 196th section, what is meant by the word "maliciously" in the section is malice in law. As to the meaning of the word "malice" see *Bromage v. Prosson* 4 B. & C. 247, and at p 255. *Chitty's Practice*. *Rex v. Justices of Suffolk* 5 N. & M. 139. [HIGINBOTHAM C. J. referred to *Reg. v. Pembilton* L.R., 2 C.C.R. 119.] Mr.

Mr. Fisher in reply. I submit the application to state a case was not made too late. The Sessions are one day Pritchard's Practice of Quarter Sessions, *Reg. v. Justices of Surrey* 1 M. & S. 479, *Reg. v. Mount and Morris* 4 A.J.R. at p. 41, the *Mignonette* case 15 Cox 624. This is a felony and there are two ingredients necessary to constitute this felony, viz.—the burning must be unlawful and it must be malicious, *Rosco* p. 277. The verdict is bad, *Reg. v. Maloney* 9 Cox. 6 *Reg. v. Reader* 4 C. & P. 245, *Reg. v. Gibson* 16 Cox 181 & 18 Q.B.D 537 *Reg. v. York* 1 Den. C.C.R., 335. [HIGINBOTHAM C. J., the recommendation by the jury is no part of their finding.] It is contradictory to it, and governs it. The effect of this verdict is that the jury have found the prisoner guilty of a trespass only.

THE CHIEF JUSTICE. In this case the prisoners were charged under section 196 of the *Crimes Act* 1890 with having unlawfully and maliciously set fire to a fence. The jury returned a verdict of "guilty with a recommendation to mercy on the ground that there was no malicious intent." It has been contended that that addition to their finding stating the ground of their recommendation must be taken as part of their finding, and equivalent to saying that the prisoners did not maliciously set fire to the fence. We do not think that that contention has been supported in argument. There has been no objection to the charge addressed to the jury by the Court. It is therefore to be assumed that the Court gave a proper definition of the offence to the jury and that that definition included these two elements of unlawfulness and malice and it is also to be assumed that the jury found their verdict in accordance with that charge. A recommendation is something apart from their finding and is no part of what the jury are sworn to do. A recommendation following upon the verdict of a jury is a suggestion sometimes offered of the opinion of the jury upon a question outside their jurisdiction viz., what would be circumstances proper to be considered by the Court in dealing with the question of punishment. That view is confirmed if it needed confirmation by *Reg. v. Trebilcock*, 1 Dearsby and Bell, C.C. 453. In that case the prisoner was indicted for larceny under the *Fraudulent Trustees Act* 20 & 21 Vict. c. 54, and it appeared that the prisoner had broken open a box which had been deposited with him and had taken out some plate and pawned it. The jury returned a verdict of guilty and recommended the prisoner to mercy on the ground that he intended ultimately to return it to the prosecutor. It was observed by the Lord Chief Justice in the course of the argument that the recommendation was no part of the verdict, and the Court found that the recommendation was no part of the finding. Now in the present case the jury have found that the prisoners unlawfully and maliciously set fire to the fence and afterwards they recom-

mend a light punishment to be inflicted because there was no malicious intent. We think that the jury must be understood to have meant by that, an absence of some malicious intent not inconsistent with the malice which necessarily forms part of their verdict of guilty. It may mean that they thought that the prisoners had no personal spite or malice against the prosecutor, and not having that feeling that that was an element which in their opinion might be considered by the Court in awarding punishment we think therefore that the jury have not found that the prisoners did not maliciously set fire to this fence and the subsequent recommendation must not be taken as part of their finding. Another question was raised in argument upon which it is unnecessary for us to express any opinion viz. as to time at which a judge must be asked and must refuse to reserve a question of law under section 485 of the *Crimes Act*, 1890, but the Crown having argued the case upon the view presented on the behalf of the prisoners, and as our view of the argument leads us to the opinion that the conviction is good and cannot be quashed it is unnecessary for us to express any opinion as to whether this case has or has not been refused to be reserved by the learned judge within the proper time, the application in point of fact not having been made until after the jury was discharged. Whether that is within a sufficient time or not we do not intend to determine. The rule *nisi* will be discharged.

Solicitor for the prisoners *Windsor*; solicitor for the Crown *Guinness*.

(Before Higinbotham C.J., Hodges and Hood J.J.)

O'BRIEN AND WIFE V. THE VICTORIAN RAILWAYS COMMISSIONERS.

April 11th.

Railways Act, 1890, s. 119—Cause of action in respect of which Railways Commissioners are entitled to notice. Time for giving notice.

An action arising out of the negligent management of railway gates is an action in respect of which the Commissioners are entitled to notice.

The words "suing out" in Section 119 of the *Railways Act* 1890, mean the issue or delivery of the writ to the person obtaining it.

Notice of action must be served on the Commissioners within five months from the day on which the cause of action arose.

This was a motion for a new trial. On the 26th December, 1890, the female plaintiff, Eliza O'Brien, was passing over a crossing upon the defendants railway at Swan Street, Richmond, and while doing so the defendants servant shut, without notice or warning, the gates upon such crossing and struck the female plaintiff, and knocked her down over a stone which, according to the plaintiff's case, was negligently and improperly left on the crossing, whereby she was injured and whereby Patrick O'Brien, her husband and the other plaintiff lost her services and society and the plaintiffs claimed £500 damages. On the 24th June following the accident the plaintiffs caused to be sent to the defendants the following notice of action:—

"To the Victorian Railways Commissioners, Melbourne. Take Notice that Patrick O'Brien and Eliza O'Brien, his wife, both of Number 12 Crown Street, Richmond, in the Colony of Victoria, intend taking legal proceedings against you for damages for negligence. The cause of action arises in respect of injuries received by Eliza O'Brien falling over a stone, placed negligently by your servant, while attempting to cross your railway at Swan Street crossing, where gates No. 5 are situate, on the 26th day of December last.

Dated this 24th day of June, 1891."

The defendants by their defence denied negligence, alleged contributory negligence on the part of the female plaintiff and took objection to the notice. The action came on for trial on the 19th November, 1891, before Mr. Justice a'Beckett and a jury of six when counsel for the defendants took the objection that the notice was insufficient and was served too late and the jury upon the direction of the learned judge found a verdict for the defendants. The plaintiffs now move that the verdict for the defendants be set aside and a new trial ordered on the grounds that the learned judge misdirected the jury in directing them (1) that the act complained of was one done under Part I. of the *Railways Act* 1890, (2) that the notice was insufficient and (3) that the notice was not properly served.

Mr. J. T. T. Smith (with him *Mr. Mullen*) in support of the motion. The first point I have to urge is that this was not an action requiring notice. It was an action of tort and not an act purporting to be done under section 119 of the *Railways Act*. There is no mention of gates in Parts I. or II. of the Act. [*HODGES, J.*—If the Commissioners may have gates, does not the management of them come under the Act?] This is an action in tort, not contract. [*Hood, J.*—If your contention is right then you would be non-suited, because if this stone was not put there in pursuance of the management of the railways, then it was put there by the railways servants wrongfully, and the Commissioners would not be liable.] The next point is that the notice given was sufficient in itself, and was sufficient as regards the time within which it was given. The accident took place on the 26th December, 1890. Now the *Railways Act* says that the action must be brought within six months after the accident, and the writ in this case was issued on the 25th June 1891, so that that was within the six months. The Act further says that the notice must be given one month before the suing out or serving of the writ. In the present case the notice was given on the 24th June 1891, and the writ was issued on the day following, the 25th, but it was not served until the 27th of July. [*Hood, J.*—What are the meaning of the words "suing out?" is not that the same thing as "issuing?" I submit not. It is some thing different from issuing; probably it means the same as serving, but it cannot be intended to refer to the issue of the writ, because if the Legislature had not meant something different from "issuing" they would not have used a different word. [*Hood, J.*—The same objection would apply to your contention that "suing out" means "serving." I don't contend that. All I contend is that "suing out" does not mean "issuing."

Mr. Box and *Mr. Bryant* to oppose the motion, were not called on.

THE CHIEF JUSTICE.—This case is free from difficulty as soon as it is understood. The first objection taken is that the present action is not one in respect of which notice of action has to be served on the Railways Commissioners. It was an action brought for the negligent management of a railway gate at a crossing. The gate was attempted to be closed without notice to the female plaintiff, who was on the crossing, and was struck by it and fell over a stone and was hurt. The cause of action is substantially for the negligent management of a gate, and that we think is an act done or purporting to have been done under Part II. of the *Railways Act* 1890, and within the terms of Section 119, and therefore was, we think, an action in respect of which the Commissioners would be entitled to notice. As to the service of the notice. The action must be commenced within six months of the act complained of. In this case the act complained of happened on the 26th December 1890, and the writ was issued on the 25th June 1891, so that the action was commenced within the six months, which did not expire until the 26th June 1891. Then the Act provides (Section 119) that

"No writ shall be sued out against nor any copy of any process served upon the Commissioners or against any person for anything done or purporting to have been done by them or him under Parts I. or II. of this Act until notice in writing of such intended writ or process has been delivered to them or him or left at the office of the Secretary or at the usual place of abode of such person by the agent or attorney of the party who intends to cause the same to be sued out or served at least one month before the suing out or serving of the same." Now in this case the notice was served on the 24th June 1891, and the writ was issued on the following day, so that the notice was not served one month before the suing out of the writ. Those words, it has been argued for the plaintiff, mean the same as "serving," but we do not think that usual language or the defined meaning of that term will admit of that contention. "Suing out" means the issue or delivery of the writ to the person obtaining it. This notice ought to have been served one month before the 25th of June. Not having been served before that time, it is defective, and the motion must be refused, with costs.

Solicitor for the plaintiff appellant, *Fay*.

Solicitor for the defendant respondent, *Guinness*.

(Before Higinbotham, C.J., a'Beckett and Hood, J.J.)

REGINA v. GREGG.

April 13th.

The Crimes Act 1891 s. 33 (2).

A prisoner was charged with committing an indecent assault upon a girl eight years of age. The unsworn testimony of the child was received under section 33 of Act No. 1231, and other evidence was also given which strongly corroborated her story but the only evidence implicating the accused was the girl's description to the mother of the person who had assaulted her, and her identification afterwards of the prisoner as the person who had assaulted her, who tallied with the description given by the child to her mother

immediately after the offence was committed. The prisoner was convicted and sentenced but the learned judge feeling some doubt whether the conviction could be sustained stated a case for opinion of the Full Court.

Held that as section 33 (2) of the Crimes Act 1891 made it necessary that the child's evidence should be corroborated by some material evidence implicating the accused the conviction could not be sustained and that evidence merely corroborative of the child's testimony on other points was insufficient to sustain the conviction and the conviction was quashed and a new trial ordered.

(*Per Higinbotham, C.J.*)—Such corroboration can only be given, so as to implicate an accused person, if the child knows at the time of the assault the person who has assaulted her, or if some other testimony exists independent of that of the child by which the assailant can be identified.

(*Per Hood, J.*) There must be some other material fact proved altogether apart from the child's story, and apart from evidence confirming her credibility, which tends to establish the guilt of the prisoner.

This was a case stated by His Honor Mr. Justice Beckett, for the opinion of the Full Court.

The case stated was as follows:—“The prisoner was charged with committing an indecent assault on Jessie Swyere. She was a girl eight years of age. The prisoner was undefended. The child was the first witness called. She seemed intelligent, but on questioning her I did not think she understood the nature of an oath. She had not been sworn in the Court below, and I did not swear her, but took her evidence under section 33 of Act No. 1,231. She unhesitatingly identified the prisoner, and said she had met him in the street when she was going on a message. He promised her a penny, and took her to an empty house and into a bathroom, the position of which she described. There he exposed his person took down her drawers, and committed an indecent assault upon her. The mother, who was then called, proved the age of the child and described the child's returning distressed from the message on which she had been sent. She said that the child described the man who had assaulted her as “a tall dark man with a black moustache and curls, dressed in dark clothes, with a boxer hat, and that he had a mark across his nose like Charlie's.” The witness stated that Charles was a man who was an inmate of her house, and that he had a scar across the nose like a clearly marked scar which was on the prisoner's nose. The child gave her mother the same account of the place where the assault had been committed and of the assault as she gave in her evidence. A constable was called, who had gone with the child, who pointed out the house and the room, which were found as she described them. He drew her attention to several men supposed to answer the description of the man who had assaulted her, and in each case she said that the suspected person was not the man. Another constable was called, who described his visit to prisoner's house and talking to him at his door in sight of the child. The prisoner went in,

and the child then said he was the man who had assaulted her. The prisoner denied that he had ever met the child, and called his wife and another witness to prove an alibi, but their evidence altogether failed to establish it. The jury convicted the prisoner, and I sentenced him to a flogging of 20 lashes and two years' imprisonment. Some time after the verdict had been given I had occasion to consider more fully the provisions of section 33, and having regard to clause 2 thereof, I doubted whether the conviction could be sustained. I therefore reserve the following question of law for the consideration and determination of the judges of the Supreme Court, and have respited the sentence of flogging until after its determination. The question is—Can the conviction be sustained on the evidence given as above set out?”

Section 33 of the Crimes Act 1891 is as follows:—

(1). Where upon the hearing before a justice of a charge of rape or of unlawfully and carnally knowing or of attempting or assaulting with intent unlawfully and carnally to know or of indecently assaulting any girl; or where upon the trial before a judge of the Supreme Court of any person for any of such offences—the girl in respect of whom the offence is charged to have been committed or any other child of tender years who is tendered as a witness does not in the opinion of the court or justices understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath if in the opinion of the court or justices (as the case may be) such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2). No person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution be corroborated by some other material evidence in support thereof implicating the accused.

(3).

Mr. Kelly in support of the conviction. The question for determination in this case arises under section 33 of Act No. 1231. This section is taken directly from the English Act 48 and 49 Vict. ch. 54 and without alteration so far as the 2nd subsection is concerned. The Crown rely upon the evidence of the child's statement to the mother immediately after the offence, as sufficient corroborative evidence to satisfy subsection 2 of section 33 of Act No. 1231. [*Hood, J.* It seems to me that the Act means and intends that there shall be some independent evidence to bear out the child's story.] I submit not. [*HIGINBOTHAM, C.J.* There is evidence to show that a place, such as described by the child as the place where the offence was committed, existed, that may be evidence corroborative of the commission of the offence.] My contention is that under this section the evidence of some third party is not necessary. [*Hood, J.* What is required here is evidence identifying the prisoner as the person who committed the assault.] [*HIGINBOTHAM, C. J.*—Is there any evidence corroborative of the identity of the accused as the person who committed the crime.] Certainly there is, the evidence of the girl describing the person who had assaulted her which description tallied with the prisoner's appearance. All that is required is that the evidence of the child should be corroborated by the facts surrounding it. [*A BECKETT AND HOOD J. J.*

The description of the prisoner by the child is not evidence implicating the accused.] The child identified the prisoner as the person who assaulted her and the evidence with respect to the scar on his nose is corroborative of that identification. [A'BECKETT J. It is not a question of identification but whether there is evidence implicating the accused.] As to the meaning of the word "corroborative" see Johnson's dictionary and as to what amounts to corroborative evidence see *Reg. v. Paul* 25 Q.B.D. 202, *Reg. v. Bates*, 8 V.L.R. (L.) 310.

There was no appearance for the prisoner.

HIGINBOTHAM, C. J. We will deliver judgment in this case on Friday the 22nd instant, and it will be advisable for the Crown to be represented in order that in event of the conviction not being sustained the Crown may suggest to the Court what course should be taken.

Curr. ad. vult.

April 22nd.

THE CHIEF JUSTICE. --This is a case in which the judge reserved a question of law for the consideration of the Court. The prisoner was charged with committing an indecent assault on a girl eight years of age. The law in being at the time of the trial was the law in force under Act 1,231, section 33, which repealed the former provisions of the *Evidence Act* regulating the admission of evidence of a child of tender years. The new law provides that if a child of tender years is tendered as a witness, and does not, in the opinion of the Court or justices, understand the nature of an oath the evidence of such child may be received if, in the opinion of the Court or justices, such child is possessed of sufficient intelligence and sense of duty to know it is speaking the truth. The judge who tried this case was of opinion that this child was of sufficient intelligence to justify the reception of her evidence, and that she did understand the duty of speaking the truth, and accordingly he received the evidence of the child. It appeared that the child, immediately after the assault was committed on her, returned to her mother in a state of distress, and told her mother that a man, whom she described as a tall man with a black moustache and curls, dressed in dark clothes, with a boxer hat, who had a mark across his face, like Charlie, a man who at that time lived in their house, had assaulted her. She did not at that time identify her assailant with the man charged. She afterwards was shown several men who were suspected by the police as possible men to have committed the assault, but she denied that any of them had been her assailant. Subsequently she saw a man speaking to a policeman whom she immediately identified as her assailant, and when her evidence was received at the trial she identified the prisoner as being that man, and upon her evidence so given the jury convicted the prisoner. The Act 1,231, proceeds, after giving the test of admissibility of the evidence of a child, to say that "no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section (33) and given on behalf of the prosecution be corroborated by some other material evidence in support thereof implicating the accused." It is suggested that upon this evidence there is no cor-

roboration implicating the accused, and we are of opinion that that objection is a good one, and must be sustained, and that this conviction cannot stand. There was evidence—in my opinion, forcible evidence—of corroboration, by other material evidence of the child's testimony in the witness-box. That evidence is contained in the statement made by the child to its mother and which agrees with and corroborates the statement made by the child in the witness-box respecting the fact of the assault, the place where it was committed, the appearance of the place, and generally the appearance and garb of the child's assailant. But the child did not at the time it spoke to the mother know the prisoner—did not then, and it could not, identify the prisoner as being its assailant,—and consequently that statement made to the mother was not evidence corroborative of the child's testimony in the box, which implicated the accused. And inasmuch as the implication of the accused is made by the section an essential part of a necessary corroboration of a child's testimony in the box, I think that the conviction of the prisoner is forbidden by this law, and that this conviction therefore cannot be sustained. I regret that the Crown has not accepted and given the consideration which we think was due to the suggestion of the Court to consider whether a new trial might not properly be granted by the Crown for the purpose of vindicating justice in this case. There have been and there are means, independent of the statute by which a child of tender years may be instructed in the nature of an oath, and may be educated to give testimony which is admissible for the purpose of vindicating the law in cases of this kind. In the absence of due consideration, which appears not to have been given, the Court is prepared to take a course which it thinks proper and will order a new trial, and it will be for the Crown to consider now whether justice can be advanced by prosecuting again in this case. I desire for myself to express a hope that the attention of the Legislature will be directed to this case and that consideration will be given by them to the subject of the law bearing upon cases of this kind, which are of frequent occurrence. Crimes of this kind are atrocious in character and deadly in effect and permanence, and in the great majority of the cases the law cannot be vindicated and the crimes, frequent as they are, cannot be punished without the aid of the child's evidence. I would not be understood to suggest that the law which has heretofore been in force should be revived. Under that law, contained in the *Evidence Act*, 1890, section 50, the test was laid down of the admissibility of the evidence of a child or infant under the age of seven years. The provisions of that section only applied to cases of assault upon an infant under the age of seven years, and it provided that, upon caution administered by the Court to the infant, and upon its being proved to the satisfaction of the Court that such infant perfectly understood the object of a declaration or affirmation, and the purpose for which its testimony was required, the evidence of the infant might be admitted. This section was limited to infants under the age of seven years, and in a very large number of

cases the evidence was inadmissible through the inability of the Court to satisfy itself that the child perfectly understood the nature and object of the declaration or affirmation which the child was required to give. The very terms "declaration" and "affirmation" are terms unfamiliar to a child of tender years, and it was only by a strain that the minds of judges could arrive at a condition of satisfaction that the child understood either the meaning of that which it was required to declare or affirm or even the very terms themselves, and consequently in these cases it was often impossible to get the test and the evidence which had to be corroborated. The new act provides a far more rational test of the admissibility of a child's evidence. It provides that the child shall be of sufficient intelligence, and that it understands the duty of speaking the truth. A child of very tender years can easily be properly trained to supply that test, and when that test is supplied, as it was in this case, the evidence is admissible. Under the old law, no corroboration was required when the evidence was admitted, but under the new law corroboration is required. I am not to be understood to express an opinion that corroboration may not be properly exacted in cases of this kind. Corroboration may be easily supplied in most cases by our law, though not by the English law. Our law admits that a statement made by a child to its mother—made after the commission of such an offence—is not part of the *res gesta*, but is evidence confirming and corroborating the testimony which the child gave in the box; and in a very large number of cases, I don't know any kind of corroboratory evidence more satisfactory than that of a female child suffering under a shock of that kind, and indicating by appearance, manners, words, and acts the distress caused by the assault. But such corroboration can only be given so as to implicate an accused person if the child knows at the time of the assault the person who has assaulted her, or if some other testimony exists independent of that of the child by which the assailant can be identified. I repeat that, considering the frequency of these crimes, and the extraordinary grave character of them, this provision of the existing law demands, in my opinion, the attentive consideration of the Legislature, and I am supported in that view by one of the most experienced and able English judges in the case of *Reg. v. Paul*, 25 Q.B.D., 202. Referring to the terms of the English law contained in the English statute, which is in the same language as our statute, Hawkins, J., expressed the same opinions which I now venture to express, and which, according to the knowledge we all possess, appear to demand the attention of the Legislature especially on account of the failure of justice in many cases from the inability of the Court to give effect to admitting evidence arising from this particular requirement of corroborative evidence implicating the accused. The conviction in this case must be quashed and a new trial ordered.

A'BECKETT, J.—I concur in the judgment which has been delivered, and I desire to express my concurrence in the regret that has been expressed that this case has been so lightly considered by the Crown,

that it came as a surprise to those representing the Crown that the question would be considered as to the probability of a child being so instructed up to a position in which her evidence would be such that a conviction might be sustained. I should, however, have said nothing in this case but for the observation made as to the expediency of altering the law. Expressing my own opinion, I think that the Legislature have carefully and wisely considered the subject; and that the safeguard which is introduced by the words under consideration in this case was a safeguard which it would be dangerous to dispense with. The atrocity and frequency of these offences is recognised to be very great; but notwithstanding that, considering the nature of the testimony receivable, and the immature mental capacity which the person giving such evidence may labour under, I am not prepared to say that an alteration of the law would be advisable in this direction.

HOOD, J.—I agree in thinking that the conviction in this case cannot be sustained. There was evidence to support the girl's story and to confirm her credibility and to show that she was telling what she believed to be the truth. But I think that the Legislature has in these cases required something more. There must be some other material evidence implicating the accused, that is, something proved altogether apart from the child's story tending to establish the guilt of the prisoner. It seems to me that the intention was that no man should be convicted upon the unsworn testimony of a child of tender years, unless other facts were established which would raise a suspicion of the accused's guilt, even if the evidence of the girl had been absent. In the present case, beyond the statement of the child there was no evidence implicating the prisoner. Nothing was proved that of itself would tend to fix the slightest suspicion upon him, and the whole of the evidence other than that of the girl would have applied to any man whatever that she had accused. Although I think that the conviction should be quashed, a new trial should be ordered, as it is quite probable that by the time the case is again tried the child, who is eight years of age and intelligent, may have been instructed in the nature of an oath, so as to be sworn and give evidence in the ordinary way. I would add that like my brother A'Beckett, I do not concur with His Honor the Chief Justice in his view as to the necessity of legislative interference in these cases. It seems to me most important that the testimony of a child of tender years in cases of this class should be supported by other evidence tending to show that the accused is really guilty.

Solicitor for the Crown, Guinness.

SUPREME COURT SITTINGS.

(Before Hood, J.)

BOWEN v. WRATTEN.

10, 19, May.

Land Act 1884 s. 32—Transfer of lease—Consent of Board of Land and Works.

The plaintiff agrees to transfer to the defendant land leased under sec. 38 subsec. 2 of the Land Act 1884 subject to the consent of the Lands Department; the lease provided that the consent of the Board of Land and Works should be obtained before assignment.

Held that by "Lands Department" both parties intended "Board of Land and Works" and that consent by the latter satisfied the agreement.

Held further that there was no assignment until the transfer was registered, and that consent before such registration was sufficient.

An agreement to assign a lease subject to such consent is not illegal as being in contravention of sec. 34 subsec. 2 of the Land Act 1884.

The plaintiff in this case was James Bowen, a farmer, and the defendant was George Wratten, a retired publican. The statement of claim set out that—

1. The plaintiff has suffered damage by the defendant's breach of an agreement in writing dated the 8th April 1891 whereby the plaintiff agreed to transfer to the defendant 861 acres of land held under lease, section 38 sub-section 2 of the Land Act 1884 being in the county of Buln Buln, parish of Budgetee allotment 52 subject to the consent of the Lands Department for the sum of 10s. 6d. per acre or £452 0s. 6d. the lot payable by the defendant to the plaintiff as soon as the transfer was completed.

2. The plaintiff says that he did at his own expense procure the consent of the Lands Department to such land being transferred from the plaintiff to the defendant.

3. The plaintiff did transfer the said land to the defendant and the transfer was completed and defendant has obtained a certificate of title to the said land.

4. The defendant has not paid the said sum of £452 0s. 6d. or any part thereof.

The plaintiff claims these damages.

Particulars.

To the transfer of the above mentioned land	£452 0 6
Interest on the same sum, 28th April 1891 being date of transfer of said land from plaintiff to defendant.	£45 0s. 0d.
Costs and expenses paid by plaintiff for defendant in respect of said land and transfer.	£45 0s. 0d.
	£522 0s. 6d.

The plaintiff claims £522 0s. 6d.

In the defence the defendant said:—

1. He does not admit that he made the said or any agreement.

2. If he made the said agreement he was induced to do so by the vendor's misrepresentation of the plaintiff that he, the defendant, and his two sons would between them be allowed to select the whole of the said land, whereas in fact and in law no more than 320 acres could be selected by the defendant and his said sons or any of them.

3. He does not admit that the plaintiff procured the consent of the Lands Department.

4. He denies each and every allegation in paragraph 3 of the statement of claim.

5. If any consent of the Lands Department was given it was not given to the transfer referred to in paragraph 3 of the statement of claim nor to the agreement referred to in paragraph 1 thereof, and was given after the making of the said alleged agreement and the execution of the said alleged transfer.

6. He will object that the said alleged agreement of April 8th 1891 was and is and the said alleged transfer was and is illegal and void as being in contravention and violation of sub-section 2 of section 38 of the Land Act 1884 and sub-section 2 of section 38 of the Land Act 1890.

7. He will also object that the said alleged agreement of April 8th 1891 was and is and the said alleged transfer was and is illegal and void as being in contravention and violation

of the regulations of the Governor-in-Council made under the provisions of the said Act and having reference to grazing areas and in contravention of the following provisions in the lease prescribed by the said regulations and issued to the plaintiff, namely that the plaintiff would not assign, sublet, subdivide or part with the possession without the previous consent of the Board of Land and Works signified in writing.

8. He will object that the consent of the Lands Department is immaterial and insufficient.

9. He will also object that it is not alleged that the consent of the Lands Department was in writing or given previously to the alleged transfer.

On this issue was joined.

The agreement referred to in paragraph 1 of the Statement of Claim was as follows:—

Malvern,

April 8th 1891.

Memorandum of Agreement made and entered into this day between James Bowen of Hawthorn and George Wratten of Silver-street, Malvern, whereby the said James Bowen agrees to transfer 861 acres of land held under lease section 38 sub-section 2 of the Land Act 1884 being in the County of Buln Buln Parish of Budgetee allotment 52 subject to the consent of the Lands Department for the sum of 10s. 6d. per acre or £452 0s. 6d. the lot payable by George Wratten to James Bowen as soon as transfer is completed.

James Bowen
George Wratten.

Witness: C. W. Stanbrook.

The other evidence so far as it is material appears in the judgment.

Mr. Forlonge and Mr. R. W. Smith for the plaintiff.

Mr. Isaacs and Mr. Hayes for the defendant.

Cur. adv. vult.

Hood, J.—The plaintiff, James Bowen, was the lessee from the Crown of certain lands under the provisions of Sec. 32 of the Land Act 1884. By an agreement in writing, made 8th April 1891, he agreed to transfer those lands to the defendant, George Wratten, for the sum of £452 0s. 6d., payable as soon as the transfer was completed, subject to the consent of the Lands Department, and on the same day the plaintiff and defendant signed an application to the Board of Land and Works for its sanction in writing to the transfer. That application was forwarded to the Lands Department, and in August 1891 the consent of the Board of Land and Works was given in writing, such consent being gazetted on August 21st. On the 11th August an endorsement was placed upon the plaintiff's lease by the Office of Titles, stating that the defendant was then the registered proprietor of the lease. In July, however, the defendant had repudiated the contract on the ground that he had been induced to make it by the plaintiff's misrepresentations. The plaintiff now sues to recover the agreed purchase-money. The defendant pleaded several defences. The first was a denial of the agreement, but this was a mere form. The next alleged misrepresentation but on this I found the facts against him. There then remained several legal objections. It was contended that the plaintiff had not performed his portion of the agreement inasmuch as he had not procured the consent of the Lands Department to the transfer or to the agreement. This objection is based upon the words in the agreement making it subject to the consent of the Lands Department. So far as this is a question of fact and so far as the Lands Department had anything

to do with the matter I have no doubt that the Department did consent and I so find. But it was urged that the plaintiff was bound to get a consent in writing. So far as the Crown was concerned I should say that the want of a written consent could be, and was, waived as the transaction was completed through and by the various Departments acting for the Crown with full knowledge. The agreement does not expressly require a written consent and inasmuch as the real object of this condition was to assure the concurrence of the plaintiffs landlord and of the Board of Land and Works so as to obtain a legal transfer of the land to the defendant I should also be of opinion that the waiver of a written consent by the Crown and its departments would be an answer even so far as the defendant is concerned so that even if there had been no written consent I should be against the defendant on this point, and would have amended the pleading as might be necessary but I think that the plaintiff did prove a written consent within the meaning of the agreement for he proved the written consent of the Board of Land and Works, and that is what I consider was really meant. The plaintiff's lease provides for the consent of the Board of Land and Works being obtained as both parties knew, while the consent of the Lands department as a separate body from the Board was utterly immaterial. The expression was used in a loose way to signify the officials having control of these matters and under that name the Board of Land and Works was I think meant it being the only body whose consent was material. "Lands department" is not, in my opinion, an unnatural expression to be used colloquially to signify the Board of Land and Works in these matters. Moreover, even if the consent of the Lands department were required that consent might well be given by the Board of Land and Works as by section 11 of the *Land Act* 1890, all matters concerning public lands are to be considered by that Board. I think therefore that the consent was sufficient. A further objection was taken to this consent. It was pointed out that the lease and the regulations required that the consent should be obtained before any assignment and it was then contended that the plaintiff should have obtained a consent before he made the agreement or before he executed a formal transfer. But the agreement was made subject to the consent, and the formal transfer had no effect till registered, therefore neither would of itself operate as an assignment so as to be a breach of this covenant. There was no assignment until registration, and that was after the consent was obtained. This objection therefore is I think untenable. It was then argued that the agreement and transfer were illegal, as being in contravention of Subsection 2 of Sec. 38 of the *Land Act* 1884 and of the regulations and of the covenants in the lease. This is again pointed at assigning without consent, and I fail to see anything illegal in the transaction. The agreement was to transfer subject to the consent of the landlord, and that consent was duly obtained before registration. There is nothing in the agreement or in the formal transfer which would have the effect of violating any

of the provisions of the Act or of the lease or of the regulations. The transfer of the lease which was effected by registration was perfectly legal, and there was nothing wrong in agreeing to sign or in signing a form of transfer prior to registration and subject to consent. The only other point is a question of admission of evidence. During the trial a document was tendered by the plaintiff and received subject to objection. That document was the formal transfer signed by both parties, and the objection taken was that there was no sufficient stamp upon it within the provisions of the *Stamps Act* 1890. It is not necessary for me to decide this point, because in my opinion the plaintiff is entitled to recover even if that document were not put in evidence. It was assumed by counsel on both sides (but as I think wrongly assumed) that this document was the transfer referred to in the agreement. A little consideration will show that this is not so. The agreement provides that payment is to be made as soon as transfer is completed. That does not mean that the defendant was to pay his money as soon as the plaintiff had signed a document of no value whatever in itself. The money is not to be paid till the transfer is completed—that is, till the lease is transferred by registration after consent. The transfer spoken of is not the mere paper form, but the transfer of the property upon completion of title by proper registration. The plaintiff in my opinion could have succeeded by proving the agreement, the consent, and the registration of the transfer by the Titles Office. The fact of registration would be *prima facie* evidence of a proper transfer, without which the department ought not to register, and it is the registration, and not the form of transfer, which is of importance as passing the title to the land. These were all the points raised and argued, and as I think both law and facts are against the defendant, there will be judgment for the plaintiff for £452 Os. 6d. and costs.

Solicitor for the plaintiff, *R. Little*; solicitors for the defendant, *Crisp, Lewis and Hedderwick*.

IN CHAMBERS.

(Before Hodges, J.)

IN RE THE PHILLIP ISLAND LAND COMPANY LIMITED.
25th, 31st, May.

Voluntary Liquidation Act 1891 (No. 1220) sec 4—*Company—Winding up—Creditors—Before a registered Company can be wound up, a resolution to that effect must be passed not only by a majority in number of the creditors present personally or by proxy or attorney at a meeting of creditors, but also by creditors to whom is owing at least one half of the amount of the debts of the Company.*

Application on behalf of The Union Bank of Australia Limited, to have a time fixed for the hearing of a petition on its behalf that the Phillip Island Land Company should be wound up under the supervision of the Court.

It appeared that a petition on behalf of the Bank for the compulsory liquidation of the Company had

been presented to Williams, J., on the 7th April 1892, when His Honor fixed the 22nd April, at the registered office of the Company, as the time and place for a meeting of the creditors of the Company in accordance with Sec. 4 of the *Voluntary Liquidation Act* 1891, to decide whether the Company should be wound up; and if so, whether voluntarily or by the Court. The meeting was duly held, at which were present the representative of the Bank, whose debt amounted to £9342 13s. 8d., and twelve other creditors or their representatives whose debts amounted in the aggregate to £627 15s. 6d. The representative of the Bank moved that the Company be wound up, when, on a vote being taken, all the other creditors voted against the motion and the meeting closed.

Mr. Anderson in support.—The legislature could never have intended that a number of small creditors could prevent a large creditor from getting his debt paid. In the present case a dead-lock has arisen, for, if the Act applies to this case, neither the Bank on the one hand nor the other creditors on the other, could ever obtain the requisite majority of creditors and the requisite amount of debts.

Mr. Neighbour for the creditors of the Company other than the Bank; and *Mr. Woolf* for the Company, contended that Sec. 4 of the *Voluntary Liquidation Act* 1891 expressly applied to cases of this kind, and therefore submitted that the application should be dismissed, but did not under the circumstances ask for costs.

HIS HONOR said:—I will consider the matter.

HIS HONOR, on a subsequent day, said:—I reserved this matter for the purpose of seeing whether it was possible for the Bank to obtain any relief under the circumstances. I have looked carefully into the matter and cannot come to any other conclusion but that the circumstances of this case come within the provisions of Sec. 4 of the *Voluntary Liquidation Act* 1891. As, therefore, a majority in number of the creditors of the Company voted against the winding up of the Company, I must dismiss the application, but without costs. I certify for counsel.

Solicitors—For the Bank, *Blake & Riggall*; for the creditors and the Company, *Davies, Price & Wighton*.

SITTINGS IN BANCO.

(Before Higinbotham C.J., A'Beckett and Hood, J.J.)

IN RE THE CAVEATS OF TALBOT AND KELLY.

April 12th.

Caveat, Transfer of Land Act 1890 s. 145.

An application by a registered proprietor for the removal of a caveat on the ground that it interfered with some future intended dealings with the land will not be entertained by the Court when it is admitted or shown that the caveat has been lodged in accordance with the Act and by a person entitled to lodge it.

In such a case the registered proprietor, in order to obtain the removal of, or in order to test the right of the caveator to lodge, the caveat must proceed in accordance with the provisions of Section 145 of the Trans-

fer of Land Act 1890.

This was a summons under Section 145 of the *Transfer of Land Act* 1890 by the registered proprietors of a certain mineral lease calling upon the caveators to show cause why two caveats lodged by them should not be removed. Some time in 1891, several persons, including the applicants and the caveators, in the present proceedings banded themselves together into a syndicate called the "Boga Syndicate" for the purpose of obtaining a mineral lease of some land containing gypsum deposits, and it was agreed that when the lease was obtained it should be transferred to some company to be formed, according to the votes of the majority of the syndicate. The lease was duly applied for by two of the members of the syndicate, Tutton and Inman, was granted and was registered in their names, and they executed a declaration of trust in which they stated that they held the lease for the syndicate and that they would transfer it subject to the votes of the majority of the syndicate. Two of the members of the syndicate Kelly and Talbot then lodged the caveats which it was now sought to remove.

Mr. Hayes in support of the summons. This is a summons under Section 145 of the *Transfer of Land Act* by the registered proprietors, Mrs. Tutton and Mr. Inman of certain mineral leases containing gypsum deposits seeking to remove the caveats lodged by the caveators, Messrs Talbot and Kelly who claim to be beneficially interested in the lease. We say that by the agreement under which the caveators claim it was agreed that these leases should be applied for and held by Tutton and Inman and that such lease should be transferred to a company to be formed according to the votes of the majority of the syndicate which consisted of the registered proprietors the caveators and five other persons who had banded themselves together for the purpose of obtaining this lease. [A'BECKETT, J.—There is no transfer stopped by these caveats, and it appears to me that the object of this summons is to get this Court to settle a partnership suit, but does the Act contemplate such a proceeding as that.] The *bona-fide* object of this summons is to have the caveats removed. We do not say that we wish to deal with this land against the caveators' interests, but what we do say is that their caveats are too broad and if they would modify their caveats to include only their own interest that is all we would ask. Seven out of the syndicate of nine desire to have these caveats removed and a transfer of the lease made to the company. The caveators' interests arise solely out of the agreement or declaration of trust and as the sole object in view when this lease was applied for was to float a company to work the lease, the caveators I submit had no right to lodge the caveats, the result of which is to stifle that very object. We do not object to a caveat being lodged to protect the caveators' rights under the agreement, viz., against any transfer except such transfer as the majority of the members of the syndicate shall require to be made.

Mr. Weigall to oppose the summons. It is admitted that the caveators are two *cestui que trusts* and that they have lodged caveats against all dealings with the land contrary to their interests. They say "if we are

parties to the instrument then it is all right but if we are not parties then these caveats are a warning to all persons who deal with the registered proprietors. The only way they could protect themselves was to lodge these caveats. The effect of lodging these caveats is that if the registered proprietors lodge a transfer of the land the caveators will get notice and then they can go and support their caveats or if they don't the caveats will lapse. The present application is premature and nothing has as yet been done which casts any duty upon the caveators to support or withdraw their caveat. No transfer nor has any registration abstract been lodged, and the registered proprietor cannot apply to get rid of a caveat merely because it will embarrass some future contemplated dealing with the land.

Mr. Hayes. The Court will look into all the circumstances of the case and see whether the caveators were justified in lodging the caveats. In the present case though the caveators have an interest in the lease they had no right to lodge caveats when the object and result of the caveats is to defeat the very object for which the syndicate was banded together. Section 147 of the Transfer of Land Act says "reasonable cause" therefore the Court must consider the facts. The form of the caveats is improper. (HIGINBOTHAM, C.J.—Has this court any power to prescribe the form of caveat seeing that the caveators have adopted one of the forms permitted by the Act though a form more consistent with the rights of all the parties might have been chosen.) The caveators had no right to lodge caveats absolutely forbidding a transfer, and they should have chosen one of the modes most suitable to the particular facts of the cases [HIGINBOTHAM, C.J. Can you raise disputed questions, of fact on an application of this kind.] I think that the Act contemplates that the court will look into the facts.

HIGINBOTHAM, C.J. These two cases must we think be determined without considering in any way the disputed facts raised by affidavit. It is admitted that these two caveators are beneficiaries and that they claim an interest in the land and they have each of them filed a caveat which is the form allowed by the Act, viz., "unless the same be subject to my said claim or unless I am a party to the instrument." The intention of the Act was that when a caveator lodges a caveat in accordance with the forms of the Act it lies upon the registered proprietor to get that caveat removed in the way appointed by the Act. So long as he does not wish to transfer no wrong is done but if he wishes to transfer, notice of such intention is conveyed to the caveator and the caveat will lapse unless the caveator takes steps to support his claim. That is the course that ought to be taken by the present applicants and they should not seek to remove caveats which have been lodged in accordance with the Act and by persons entitled to lodge them. The applicants have taken the wrong course in the present case and this summons must be dismissed with costs.

Solicitors for the applicants, *Lynch, McDonald, Stillman and Keep.*

Solicitor for the caveators, *Talbot.*

(Before Higinbotham, C.J., Williams and Hood, J.J.)

BOYES v. MOSS AND CO.

March 23rd, 24th, 25th.

Bill of lading. Lightermen as common carriers. Contract by master or agent of ship, right of consignee as undisclosed principal to sue on. Abandonment, who may sue after.

The customary clause in a bill of lading providing that "consignees or their agents must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the master or agent shall be at liberty to land and warehouse the goods, or discharge them into a store ship, or hulk, or into lighters, or on a wharf, as customary, at the merchant's risk and expense," gives the master or agent of the ship an implied authority to make, as agent of the consignee, a contract with lightermen and others for the carriage of goods from the ship's side to some safe and convenient place, and the consignee as the undisclosed principal of the master or agent of the ship, may, if he so elect, bring an action in his own name upon such contract.

An insurer of goods may, after a complete abandonment of such goods to the underwriters, bring an action in his own name for the recovery of the value of the goods, for and on behalf of the underwriters.

The question whether a person is or is not a common carrier is always a question of fact.

Lightermen who hold themselves out to and who do carry at current rates for any persons who desire to employ them are common carriers.

This was an appeal from the County Court. The plaintiff was the consignee of three casks of hardware ex. the S.S. Wilcannia. The defendants were lightermen, and were employed by the ship's agents to lighter the ship Wilcannia and carry the plaintiff's goods from the ship which was anchored in Hobson's Bay to the Australian Wharf, Melbourne, and while in the defendants' charge one of the casks of hardware was lost, and the plaintiff sued the defendants to recover the value of the goods so lost. The defences set up were (1) that the defendants were not common carriers and that they were sued as insurers and not for negligence. (2). That there was no privity of contract between the parties. (3). That the property in the goods remained in the captain of the ship and (4) that the plaintiff had abandoned the goods to the insurers. By the bill of lading under which the goods were carried in the S.S. Wilcannia it was provided that "consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the master or agent shall be at liberty to land and warehouse the goods or discharge them into a store ship or hulk or into lighters or on a wharf as customary at the merchant's risk and expense. The ship shall have a lien upon the goods for all freight and charges for which the goods are liable under the bill of lading." It was also provided that the goods should be "delivered . . . in like good order and condition from the ship's deck at her anchorage to the plaintiff or his assigns." It was

admitted that the cask (the subject of the action) was received on board the lighter, that the lighter took fire and was scuttled and that the cask was afterwards recovered and brought to the Australian wharf in a damaged condition. For the plaintiff evidence was given that the defendants were well known lightermen and had frequently carried goods for him from various ships to the wharf, and that he had always paid them the current lighterage rate of 5s. per ton and had never made any special bargain with them as to rates. Plaintiff also admitted in cross-examination that he had abandoned the goods sued for to the insurers (the Southern Insurance Company) and that he was bringing this action on their behalf. It was also proved that it was customary for ships' agents to arrange with lightermen for the lightering of goods and that the consignees paid the lighterage to the lightermen, and evidence was also given that in the present case the agents of the S.S. Wilcannia arranged with the defendants to lighter the plaintiff's goods at "current rates." The defendants gave evidence that they sometimes refused to carry goods that were offered to them, that they did not ply to and from fixed termini, that there was no fixed rate for carriage but that rates differed according to the class of goods offered for carriage and that in each case a special arrangement was made. The learned county court judge reserved his decision and subsequently gave judgment for the plaintiff for the amount claimed. From this judgment the defendants appealed.

Dr. Madden for the defendant appellant.—The first question is, are we common carriers, and I submit we are not. A common carrier is a person trading between fixed termini, open to engagement to the first and every comer at a certain and fixed rate, with a proviso that he is not bound to carry dangerous or not carriageable goods. As to what a common carrier is, I would refer the Court to *Nugent v. Smith*, 1 C.P.D. 423 (judgment of Cockburn, C.J.), and to *Liver Alkali Co. v. Johnson*, L.R. 7 Ex. 267 and 9 Ex. 338 at p. 343; *Scalfe v. Farrant*, L.R. 10 Ex. 358. In no case do we agree to carry except upon special rates. We carry to different places where the risk is greater and the distance greater, and in all cases special agreements are made. There is no fixed rate of carriage. *Brind v. Dale*, 2 M. & Rob. 80. I now proceed to consider the question as to how far this contract is one upon which the plaintiff Boyes has any right to sue on the ground that there is no privity between him and the defendants, the contract having been made by the shipowners with the defendants. *Goldsborough v. McCulloch*, 5 W.W. & A.B. (L.) 154; *Gwyatt v. Hayes*, 2 A.J.R. 107. Then dealing with the question as to the abandonment of the goods to the underwriters, I would refer the Court to *Arnold's Marine Insurance*, 6th Ed., Vol. II., 954, 956, 957, 973. [*Mr. Wood*. We admit that we are suing for the insurance company.] That is just what you may not do; *Arnold's Marine Insurance*, 6th Ed. Vol. II., 973. Authority shows that upon complete abandonment the right of action itself is transferred. I submit this appeal should be allowed.

Mr. J. D. Wood for the plaintiff respondent.—We say that whether the defendants were common carriers or not, they are liable for the loss of the goods as bailees. It was proved that the goods were delivered to the defendants to be safely carried, and it is admitted that they were lost, and that casts the burden of proof on them to show that the goods were not lost through their default or negligence, and they have given no evidence on that point whatever. The non-delivery of the goods is *prima facie* evidence of a breach of the contract, and it is for the defendants to show that this breach did not arise through their default. As there is a *prima facie* breach, it is for the defendants to discharge their liability by giving evidence that they are not common carriers, and to show that the loss did not arise through their default. Assuming that the Court is against me on this point, I say that the defendants are common carriers, and that this fire and consequent loss of the goods took place through their default. As to parties, this contract was made by the agent of the consignee, and the mere fact that the defendants did not know at the time when they entered into the contract who the principal in the matter was does not in any way prevent the principal from coming forward and suing the present defendants. It would not have prevented the defendants from suing the principal. Under the conditions of the bill of lading there is authority to the shipowners to make this contract with the lightermen for the consignee. [*Hood, J.*: Does not this clause in the bill of lading merely mean "If you are not there to take possession of the goods on the arrival of the ship we will put them ashore for you," but not acting as agent for the consignee.] It has been decided that a carrier's liability is not discharged by merely putting the goods on the wharf if there is nobody there to take care of them. He must take care of them in a reasonable way, *Bourne v. Galliffe*, 11 Cl. & F. 45, 7 M. & G. 850. Upon the words in this clause of the bill of lading there is power to the shipowners to deal with the goods, but when he has delivered them into the lighter he has nothing more to do with the matter. After that any loss is between the lightermen and the consignee. [*Williams, J.*: If the consignee is not ready to receive the goods when the ship reaches her destination, the master has authority to land the goods and deal with them in a reasonable way. Is the master in dealing with the goods in such reasonable way the agent of the consignee, or are the contracts that he makes his own contracts.] If the contracts were for storage the master would be liable, unless he stipulated that he should not be liable, on the principle of undisclosed principal, but if the question is whether without that stipulation he would have authority to bind the consignee, I say that he would have such authority, so that the consignee could be sued by the warehouseman. The master has authority to deal with the cargo in a reasonable manner. The agency is to do whatever it is reasonable to do, *Gaudet v. Brown*, L.R. 5 P.C. 134. [*Williams, J.*: If a master has authority to do an act for a consignee, he has authority to do that which is reasonably necessary to do that act.]

Before going further, I should like to say with respect to a question asked by some of the members of the Court yesterday, as to what are the rights of the shipowner as to his lien on the goods—whether by landing the goods he loses his lien for freight. The only authority I could find on the point is *Mors-le-Blanch v. Wilson*, L.R. 8 C.P. 227 (see judgment of Keating, J. at p. 237), but the point is not material in this case, as the freight was paid in England. [HIGINBOTHAM, C.J.: Do you admit, assuming that this clause in the bill of lading does not give authority to the master to make a contract of this kind, that the master would not have such authority.] I do not, I say that the master of the ship is in cases of necessity the agent of the cargo owner, *Gaudet v. Brown*, L.R. 5, P.C. 134, see pp. 164, 165. [WILLIAMS, J.: Do you admit that the lighterman could have sued either the shipowner or the consignee for the carriage of the goods.] The agent of the ship undoubtedly when he puts the goods on the lighter, makes the contract with the owner of the lighter, but I say that he makes that contract as agent for the owner of the goods. He no doubt is liable to be sued on that contract as principal, unless he expressly stipulates against such liability, but the owner of the lighter may, on discovering who the principal is, elect to sue the principal. He can only sue one, not both, but he has his election. [HIGINBOTHAM, C.J.: In the present case it is the other way round, can the consignee sue either the shipowner or the lighterman?] In the present case the shipowner as soon as he puts the goods on the lighter, is in pursuance of the bill of lading, discharged. [WILLIAMS, J.: Is the master the consignee's agent to bind the consignee by a contract which he makes, to enable him to do that which the common law permits him to do. [HOOD, J.: If the act is reasonable it is reasonable to make a contract to bind the principal in respect of that act.] If the master has authority to act for the consignee he would have authority to use the best and most reasonable means to effect that act. My contention is that this contract binds the consignee, and that he has the right to sue, first, on the authority which a master or agent of a ship has in cases of necessity to protect the cargo, secondly, on the authority conferred by the bill of lading, and thirdly, that the course of practice shown by the evidence is that these contracts are made on behalf of the consignee of the goods, who thus becomes an undisclosed principal. My next contention is that it being admitted that these goods were not delivered, we are entitled to recover, and for this part of the argument it must be assumed that the defendants are only bailees, and are not liable except in case of default, but I submit that the bailor makes out a *prima facie* case, when he shows that there was a bailment, and that the goods were not delivered to him in the condition in which they were bailed. [WILLIAMS, J.: That seems plain. The bailor says, I handed the goods to you to be carried, and you have not carried them; the bailee says, I was prevented from carrying them by fire; to which the bailor answers that fire was caused by your negligence.] [HIGINBOTHAM, C.J.: We are all with you on that point.] The next question is the

abandonment, viz.: whether this action should have been brought by the insurers or by the plaintiff. It is well established, and is a usual practice for the persons whose goods are lost to bring an action for the insurance company, *Peyton, Dowling and Co. v. Houlder Bros.* 16 V.L.R. 812. [Dr. Madden: In that case there was no evidence that the goods had been abandoned.] [HIGINBOTHAM, C.J.—There is the old rule, that the party who has the equitable right of action, may apply to the Court to compel the party in whom the right of action is to allow the use of his name.] [WILLIAMS, J.—I would like to be satisfied on this point. If the effect of abandonment is to divest the person who abandons not only of the property in the goods but also of his right of action in respect of these goods, and vest them in another person then ought not the action to have been brought in the name of the Insurance Company.] The authority for that proposition rests upon the opinion of certain French jurists, and it is new to me that the opinion of French jurists should be regarded as sound on adjective law. [HIGINBOTHAM, C.J.: Kent says the effect of abandonment is to subrogate the person abandoning to the insurance company. That seems to go a long way.] There is no contest here about property; what we are asking for is damages for breach of contract, and the right of action arose before the abandonment. [WILLIAMS, J. Once the abandonment takes place it relates back to the loss.] That may be so, but a right of action exists apart from the property in the goods. *Loundes on Marine Insurance*, pp. 224, 225 *Simpson and Co. v. Thomson*, 3 App. Cas. 279, and at p.p. 284, 293. The action must be in the name of the insurers. On the question of parties with respect to the cases referred to by the other side. In *Goldsbrough v. McCulloch* 5 W.W. and a'B. (L.) 154 there was nothing in the facts to show that Desailly was in any way the agent of Goldsbrough and Co., and *Gwyatt v. Hayes*, 2 A.J.R. 107 was merely a decision on the facts of that particular case and did not lay down any principle of law.

Dr. Madden in reply. The cases referred to by Mr. Wood with reference to the effect of abandonment upon the right to bring this action in the name of the insured turn upon a different principle, they are cases in which there was total loss, and in such cases the property is not transferred and therefore the insured can sue as trustee for the insurer. Lord Mansfield's expression in *Mason v. Sainsbury* 3 Douglas Rep. 61, was a mere careless expression, and though it refers to "abandonment" it was not founded upon any authority and the dicta in *Yates v. Whyte* 4 Bing, N.C. 272 at p. 283 are based upon the expression used by Lord Mansfield. In *Simpson v. Thomson* 3 App. Cas. 279, the question before the court was one of total loss. The insurer had no interest in the subject matter in the case of abandonment. There is no decision as to the precise point when there has been an abandonment. There are cases where the insurer has sued in his own name. *Sharp v. Gladstone* 7 East, 24; *Case v. Davidson*, 5 M. and Sel. 79; *Phillips on Insurance* 4th Ed. Vol. II. p. 402 ph. 1711; *Stewart v. Greenoch Marine*

Insurance Coy. 2 H.L.C. 159; *Blaauwpot v. Da Costa* 1 Eden 130; *Atlantic Insurance Co. v. Storrow* 5 Paige's Ch. R. 285. Unless the court decides that we are common carriers the plaintiff must fail because he has proved no damage. In a count against a bailor where the goods have been delivered in a damaged state the plaintiff is bound to prove that the damage was caused by the negligence of the defendant. [WILLIAMS, J. : It seems to me that there is a marked distinction between not carrying the goods to their destination at all and carrying them to their destination but in a damaged state. In the latter case the plaintiff must prove that the goods were not carried with reasonable care and consequent damage.] Yes. And then the question comes back to this. Were we common carriers? The shipowners in this case acted on their own behalf and to protect themselves, as the voyage did not end until they had delivered the goods to the consignees. If the consignee does not come to take delivery of the goods within a reasonable time, then the master may under the bill of lading put the goods into lighters or store them, but he does this on his own behalf and to protect himself. The master has no authority to make a contract for the consignee except in cases of extreme danger, and for the benefit of the whole adventure. *Gaudet v. Brown*, L.R. 5 P.C. 134.

Mr. J. D. Wood.—The cases cited for the defendant on the question as to whether the action should not have been brought in the name of the insurance company do not bear much on the present case. *Sharp v. Gladstone* 7 East. 24, was an action by the underwriters against the shipowners for money had and received, and throws no light on the present question. So also was *Case v. Davidson*, 5 M. & Sel. 79, an action by the underwriters, and what was decided there does not in any way affect my present contention. The writers Phillips, Emerigon and Vallin do not deal with procedure and parties, they merely deal with general principles. *Phillips on Insurance*, 4th Ed., Vol. II., p. 627 § 2010, was referred to. These jurists are no authority for adjective law. There are other cases, but I need not repeat my argument. *Davidson v. Case*, 2 Brod. & Bing 379 and at p. 387; *Stewart v. Marine &c. Insurance Co.*, 2 H.L.C. 159, referred to in *Miller v. Woodfall*, 8 El. and Bl. 493 and at p. 503; *Simpson v. Thomson & Burrell*, 3 App. Cas. 279, referred to in *Midland Insurance Co. v. Smith* 6 Q.B.D. at p. 565, and in *Castellain v. Preston*, 8 Q.B.D. at p. 617, and in 11 Q.B.D. at pp. 390 and 402. Before touching on the question whether Moss and Co. were common carriers, I would like to say a few words as to costs. Suppose the Court should be of opinion that Moss and Co. are not common carriers, still on the evidence as it stands we are entitled to the judgment of the Court, and we should be entitled to all the costs even if the Court thinks the defendants have been misled and desire to obtain a new trial; *County Court Act* 1890 s. 61. [WILLIAMS, J. : The view I was pressed with was that if the defendants were not common carriers plaintiff must in that event prove that the defendants were guilty of want of reasonable care.] I submit that it is sufficient to show that the goods

were entrusted to the defendants, and that the plaintiff received them in a bad condition. All the plaintiff has to prove is that the goods were damaged. Now as to who are common carriers, it is laid down in the notes to *Coggs v. Bernard*, Sm. L. Cas., 8th Ed. p. 199, that the owner of a general ship is a common carrier, and it is not necessary for it to ply between fixed termini. The term "general ship" is used in contradistinction to a ship let out to some particular person; *McLachlan on Shipping*, 2nd Ed. 365. The owner of a general ship is *prima facie* a common carrier for hire; *Abbott on Shipping*, 11th Ed., pp. 100, 277. If the *Wilcannia* was a ship which took the goods of all persons who might tender goods for carriage she was a general ship, and if that be so then the lighter which took the same goods from her side to the wharf at Melbourne was also a general ship. [HOOD, J., handed down the case of *Maving v. Todd*, 1 Starkie 72, which showed the liability of a wharfinger.] *Falconer's Marine Dictionary* definition of lighter. Hoymen and lightermen are referred to as common carriers. It is not necessary for me to go as far as the *Liver Alkali Co. v. Johnson* L.R. 7 Ex. 267 because there the hiring was by a single person, while here there is no such exclusiveness. Every consignee who chose could put his goods on board the vessel. These lightermen ply at fixed rates. The evidence is "current rates" that is the fixed rates and charges for which they as a general body carry goods, variable no doubt according to the class of goods to be carried and the distances they carry them, but there was never any special agreement made as to the rate of carriage. "Current rates" was all that was said. In *Nugent v. Smith* 1 C.P.D. 423 it was undisputed that the defendant was a common carrier. [HOOD, J. refers to *Ingate v. Christie* 3 Car. and K. p. 61.] I submit then in this case it is quite clear that the defendants are common carriers.

Dr. Madden. The cases of *Maving v. Todd* 1 Starkie 72 and *Ingate v. Christie*, 3 Car. and K. 61 referred to by Mr. Justice Hood merely amount to the proposition that when a person holds himself out to carry for all persons he is a common carrier and that takes us no further. [WILLIAMS, J. If it is established that a man's business is to carry and that he carries for everyone who likes to give him goods, then is not the fact that he has refused to carry on one or two occasions a question of fact to go to the jury as to whether he is not a common carrier.] I submit not, but here the whole of the evidence shows that in every case an express arrangement was made as to rates. [HIGNOTHAM, C.J. Is the fact of terms being made conclusive evidence that a person is not a common carrier?] No, not in single instances, but what the defendants say is "we are carriers and carry for anyone who likes to employ us, provided that there must be an express arrangement as to rates. [WILLIAMS, J. It seems to me that the lightermen carry for everyone at current rates fixed by the lightermen themselves and I cannot see any evidence of a special rate having been agreed upon.] Several of the witnesses say that they

always believed that lightermen might refuse to carry any particular goods or for any particular person. [Hood, *J. Ingate v. Christie* 3 Car. and K. 61 is very like this case.] In that case the judge probably directed the jury as he did because there was no evidence of any express arrangement. In *Maving v. Todd* 1 Starkie 72, the goods were put on the wharf incidentally to the carrying thereof. On the question of abandonment I would refer the court to *Camell v. Sewell* 3 H. and N. 617 and 5 H. and N. 728.

Cur. ad. vult.

April 29th.

HIGINBOTHAM, C.J.—Appeal from the County Court at Melbourne. The plaintiff claimed in this action the value of a cask of hardware belonging to him, which was delivered to the defendant on or about the 7th November, 1890, to be safely carried by him from the Wilcannia, a ship lying in the port of Melbourne, in the lighter Restless, to the wharf at Melbourne, but which was not so carried. The defendant rested his defence on the following three grounds:—First, that there was no privity of contract between the plaintiff and the defendant; second, that the plaintiff abandoned the goods to the insurers; and third, that the defendant was not a common carrier, and was sued as an insurer, and not for negligence. The judge overruled these objections, and gave judgment for the amount claimed, £25 11s. 4d., with costs. The same questions that were determined by the learned judge in the court below have been raised for our determination upon this appeal. They are all questions of some mercantile importance, and they have been fully and ably argued. First, it has been contended for the defendant that there is no privity of contract between him and the plaintiff. The plaintiff was consignee of the goods under a bill of lading, by which the goods were “to be delivered (subject to the exceptions and conditions hereinafter mentioned) in the like good order and condition from the ship’s deck at her anchorage (where the ship’s responsibility shall cease) at the aforesaid port of Melbourne,” to the order of the consignee.

One of the conditions was as follows:—

“Consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the master or agent shall be at liberty to land and warehouse the goods, or discharge them into a storehouse, or hulk, or into lighters, or on a wharf, as customary, at the merchant’s risk and expense.”

The defendant was the representative of a firm of lightermen who had been employed by the plaintiff for many years to carry goods for him from ships in Hobson’s Bay to the Australian wharf in Melbourne. The defendant with other lightermen had been employed for the same purpose by Messrs Sanderson and Co., agents for the steamship Wilcannia. The agents usually arrange with the lightermen for the lighterage of goods, and in the present case, in accordance with the usual practice of agents, an advertisement appeared in *The Argus* after the ship had been reported at the Customs-house, announcing that “Cargo will be discharged into Moss’s lighters and conveyed to No. 8½ shed Australian wharf, at current rates.” The

practice was that the lighterage should be paid by the consignee of the goods to the lightermen, not to the shipping agent, who did not collect lighterage. If consignees wished to take delivery themselves at the ship’s side they could do so. If they did not wish to do so the ship’s agent made an arrangement with the lighterman to lighter the goods and hold them until the bills of lading were presented to him with the ship’s agent’s endorsement in proof that the freight had been paid. In the present case the plaintiff presented the bill of lading to the defendant, and received two of the casks which were not injured. He paid lighterage for these and got a receipt, and he refused to take delivery of the damaged cask, the subject of this action. For the defendant it was urged that upon this evidence he had been employed as a lighterman by the ship and not by the plaintiff, the consignee, and that consequently the master or shipowner alone could sue for loss of, or damage to, goods after they were transhipped into a lighter. It was argued in support of this view that the only object of the condition in the bill of lading was to enable the shipowner to discharge the goods at the expense of the owner of the goods without loss to the shipowner of his lien for freight, and that it was unnecessary and improper to construe the clause as giving power to the master or agent of the ship to enter into contracts for lighterage as agent for and on behalf of the consignees. We are unable to concur in this view. The master of a carrying ship has power, and also a duty in certain cases, without any special provision in the bill of lading, to discharge goods at the ports of discharge at the expense of the owner after the lapse of a reasonable time, and in a reasonable manner, without losing his lien for freight of the goods. The law on this subject is clearly stated in the judgment of the Privy Council in the case of *Cargo ex Argos, Gaudet v. Brown*, L.R. 5. P.C., at pages 164-5:—

“Several cases have arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others, *Trunton v. Dent*, 8 Moore, P.C., 419; *Notara v. Henderson*, L.R. 7, Q.B., 225; *Australasian Navigation Company v. Morse*, L.R. 4, P.C. 222.) It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing. Most of the decisions have related to cases where the accident happened before the completion of the voyage: but their lordships think it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has expired. It is well established that if the ship has waited a reasonable time to deliver goods from her side the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advice, he had authority to carry or send them on to such other places as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that the expenses properly incurred may be charged to him.”

At common law, then, the master has power to land goods, of which the owner has not taken delivery, without losing his lien for freight, and to charge the owner with the expenses of landing, and this power probably carries with it an implied authority to enter into contracts for this purpose on behalf and for the benefit of the owner. But the master's power at common law only arises after a reasonable time—that is to say, a reasonable time under the circumstances which exist at the time of unloading in each case, *Hick v. Rodocanachi* (1891), 2 Q.B., 626 (C.A.,—has been allowed to the owner to take delivery himself at the ship's side. The uncertainty and delay arising from this cause in the discharge of cargoes of general ships have led to the introduction into bills of lading of a clause like that contained in this bill of lading. (Clauses of this kind, as was observed by Lindley, L.J., in the case just cited at page 662, are "obviously inserted in the interest and for the benefit of the shipowner, and they give him an additional remedy for the recovery of what is due to him, and not a remedy in substitution for any which he would have apart from this clause." This clause is advantageous to the consignee of goods as well as to the shipowner, as it fixes a time at which the consignee can take delivery for himself if he thinks fit so to do, and enables the master or the agent of the ship to act for him and for his benefit if he is not able or willing to act for himself. We are of opinion that an agreement of this kind between the master and the shipper of goods, the rights and liabilities of which are transferred to and vested in the consignee by statute, includes an implied authority to the master or agent of the ship to make as the agent of the consignee, a contract with lightermen and others for the carriage of goods from the ship's side to a safe and convenient place, and that the consignee, as the undisclosed principal of the master or agent of the ship, may, if he so elect, bring an action in his own name upon such contract. The judgment appealed from was therefore right in holding that there was privity between the plaintiff and the defendants created by the contract founded upon this clause in the bill of lading. Apart from this there was ample evidence that both parties ratified the contract made in this case by the agents of the ship, the defendant by charging and taking payment for the lightage of the casks that were delivered, and the plaintiff by paying the lightage, and by bringing this action. The plaintiff abandoned the third cask to the underwriters and brought the present action against the defendants for the underwriters and at their request. It was contended for the defendant, secondly, that the action should have been brought in the name of the underwriters. It was not disputed that the legal effect of the abandonment by the insured is to subrogate the underwriters into the rights and liabilities of the assured, and to vest in them the property in the thing insured from the time of the casualty. But it has been shown that from the time of Lord Mansfield down to recent times the insurer on abandonment has used the name of the insured to bring an action to enforce his rights of pro-

perty in the thing abandoned—*Mason v. Sainsbury*, 3 Doug., 61; *Yates v. White*, 4 Bing's New Cases 272; *North of England Iron Steamship Association v. Armstrong*, L.R. 5 Q.B. 244; *Sea Insurance Company v. Hadden*, 13 Q.B.D., at p. 712. The assignment by abandonment has been treated as an equitable assignment, and although it may be that under the existing law an action could be brought by the insurer in his own name it does not follow that he may not also sue, in accordance with an established practice, in the name of the insured and for his own benefit. This objection also fails. Thirdly, it was contended that the defendant was not proved to be a common carrier and that therefore he was not an insurer, and as no proof was given that the injury to the cask was caused by his negligence the plaintiff was not entitled to recover. The question whether the defendant was or was not a common carrier was a question of fact. The learned judge found that he was a common carrier, and there was evidence, in our opinion, to justify the finding. It was held by Alderson, B., in *Ingate and another v. Christie*, 3 Car and K. 61, that—

"Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but, if he does not do it for everyone, but carries for you and me only, that is, matter of special contract."

"We must treat it as firmly established," Blackburn, J., observed in *Liver Alkali Co. v. Johnson*, 9 Exch., at p. 340, "that in the absence of some contract, express or implied, introducing further exceptions" (i.e., beyond acts of God and the enemies of the Queen) "those who exercise a public employment of carrying goods do incur this liability" (i.e. the liability of common carriers). It was held in this last-mentioned case that the fact that the defendant did not ply between any fixed termini did not relieve him from the liability of a common carrier. Evidence was offered by the defendant to show that his lighters did not always travel from or to fixed points, and that he sometimes, though not very often, refused engagements. But the judge was not bound to accept this as against the proof that the defendant ordinarily held himself out as exercising the public employment of a lighterman from the anchorage in Hobson's Bay to Queen's Wharf for all who wished to employ him. The appeal has failed in our opinion upon all points, and it is dismissed with costs.

Solicitors, for the defendant appellants, *Gillott, Croker, Snowden and Co.*

Solicitors, for the plaintiff respondents, *Malleon England and Stewart.*

(Before Higinbotham, C.J., Williams & Hood, JJ.)

CAFFYN V. HOWARD SMITH & SON, LTD.

March 28 & 29.

Appeal—Interlocutory order—County Court Act 1890, s. 133.

An appeal will lie to the Full Court from an order of the County Court, interlocutory as well as final.

This was an appeal from the County Court. The plaintiff in the court below was for (1) personal injuries sustained by plaintiff whilst in the service of the defendants, on board the defendants' ship "Era," by reason of defect in the machinery and plant, or by reason of the negligence of a person in the service of the defendants, who had superintendence entrusted to him. (2.) Personal injuries sustained by the plaintiff on board the defendants' ship "Era" caused by the negligence of the defendants in supplying improper and insufficient means for persons employed in the hold, to ascend from the hold or lower deck. The action was tried before a judge and jury, and the defences raised were: To the statutory claim (1) Denial of all the material allegations. (2) Contributory negligence. To the common law claim (1) No negligence. (2) Negligence of fellow servants. (3) Contributory negligence. The jury found for the plaintiff, damages were assessed at £468, and judgment for that amount with costs was entered up. The defendants moved for a new trial on the grounds (1) That there was evidence that the plaintiff was guilty of contributory negligence. (2) That the verdict was against evidence and the weight of evidence. (3) That the verdict was erroneous and contrary to law. (4) That evidence was improperly admitted and rejected. (3) That the learned judge misdirected the jury. At the conclusion of the arguments the learned judge directed that the verdict should be set aside and a new trial ordered, on the ground that a verdict should have been directed for the defendants at the trial, inasmuch as all the evidence given at the trial, showed that the plaintiff was guilty of contributory negligence, and that there was no evidence proper to be submitted to the jury on behalf of the plaintiff on the question of contributory negligence. Against this order the plaintiff appealed on the grounds (1) That the learned judge erroneously directed that a verdict should have been directed for the defendants at the time, on the ground that all the evidence given at the trial showed that the plaintiff was guilty of contributory negligence. (2) That the learned judge erroneously decided that there was no evidence proper to be submitted to the jury on behalf of the plaintiff on the question of contributory negligence, and (3) That upon the trial the question of contributory negligence was properly left to the jury.

Mr. Leon and *Mr. Duffy* for the plaintiff appellant after reading the evidence submitted that there was abundant evidence of negligence on the part of the defendants and that the case was properly left to the jury.

Dr. Madden (with him *Mr. Purves* Q.C.), for the defendant respondent. This court has decided that an appeal from the order of a County Court judge directing a new trial will not lie. *Cooper v. Higgins* 2 A.L.T. 8; 6 V.L.R. (L) 186. [HOOD J. There is another case to the same effect *Walker v. Graham* 3 A.L.T. 75.] The *County Court Act* 1890 s. 96 seems to put it as a question which the learned judge himself, who is present at the trial, can alone determine. [HIGINBOTHAM, C.J. That would be much wider than the powers of a judge of this Court.] Yes! but the

powers of this court are derived from common law while those of the County Court judge are determined by statute which places no limit upon him. [*Hood, J. Murtagh v. Barry* 24 Q.B.D. 632 disposes of that argument.] The section in our Act is wider than the section upon which that case was decided. [Hood, J. The latest case on the subject is *How v. London and North Western Railway Co* (1891) 2 Q.B. 496. Going to the facts they are all one way that the plaintiff brought about the accident by his own negligence. *Collins v. Munro* 14 V.L.R. 1 [HOOD, J. In that case the danger was obvious.]

Mr. Duffy in reply. There is no authority which goes the length of saying that no appeal lies from the order of a County Court judge directing a new trial. The general rule was that if a judge was dissatisfied with the verdict of the jury he might order a new trial. That was laid down in *MacDonald v. Hughes*, 3 A.L.T. 103, 8 V.L.R. (L.) 59. Then *Cooper v. Higgins*, 2, A.L.T. 8, decided that a County Court judge ought to be in the same position as a Supreme Court judge, and then there are the cases of *Sutton v. Hayes* Argus R. 19th Dec. 1878 and *Walker v. Graham* 3 A.L.T. 7. But this is not a case of a judge being dissatisfied, this is purely a point of law. If those cases are to be construed as laying down the rule contended for then I say such rule has been abrogated. *Murtagh v. Barry* 24 Q.B.D. 632, *How v. North London and Western Railway Co.* (1891) 2 Q.B. 496 [HIGINBOTHAM, C.J. The question was discussed in *Malpas v. Malpas* and I remember that on looking into the authorities I found that as long ago as Lord Mansfield that it had been held that if a judge ordered a new trial on the ground that he was not satisfied with the evidence, an appeal would go unless it were shown that the jury could not as reasonable men have come to the decision that they had come to. [HOOD, J. *Thompson v. Andrews* 5 A.L.T., 181 put the refusal of an appeal on the ground that the order for a new trial is not a final order.] Section 133 of the *County Court Act* 1890 places no limitation as to the orders which may be appealed from with the exception of those expressly mentioned in the section.

Cur. ad. vult.

April 29th.

HIGINBOTHAM C.J. :—The plaintiff recovered a verdict in the County Court at Melbourne for £468 in an action against the defendants for negligence. The judge of the County Court set aside the verdict and ordered a new trial on the ground that all the evidence given at the trial showed that the plaintiff was guilty of contributory negligence, and that there was no evidence proper to be submitted to the jury on behalf of the plaintiff on the question of contributory negligence. A preliminary objection was taken to the hearing of the appeal, viz., that the Court would not hear an appeal against an order of a judge of the County Court granting a new trial. *Sutton v. Henry*, A.R., December, 1878, *Cooper v. Higgins*, 2 A.L.T., 8, and *Walker v. Graham*, 3. A.L.T., 75, were cited in support of this objection. The decisions in those cases rested on the ground that the judge having expressed

himself dissatisfied with the verdict, the Court would not interfere with his order. Although there have been some decisions which favour the view that the dissatisfaction of the judge who has heard the case is a sufficient ground for granting a new trial, some of the older and the whole current of more recent decisions are against the view, and it is no longer open to doubt that a new trial will not be granted upon this ground alone. See *Malpas v. Malpas and others*, 11 V.L.R., at pp. 700-704, and the recent decision of the Full Court in *M'Meckan v. Aitken*, 13 A.L.T., 199. Reliance was also placed upon the decision of Molesworth, J., in *Thomson v. Andrews*, 9 V.L.R. (Eq.), 28, who held that he had no jurisdiction to hear an appeal under section 120 of the *County Court Statute* 1869 (section 133, *County Court Act* 1890) from an order not being a final order in a suit, as that section appeared to contemplate appeals only from such orders as, in one alternative at all events, finally disposed of the case. The reason assigned for this view, namely, that the section contains a prohibition against sending a case back to the County Court, appears to be insufficient, for the prohibition referred to only applies to cases where the court of appeal directs the cause to be reheard. The terms of the section are quite large enough to cover any order, whether interlocutory or final. The last proviso in the section clearly recognises the right of appeal against interlocutory decisions, for it expressly excludes an appeal in the case of one interlocutory decision only—namely, a decision given upon any question as to the value of any real or personal property for the purpose of determining the question of the jurisdiction of the Court. The framers of the rules, orders, and forms for regulating the practice and proceedings in County Courts, which have the same force and effect as if they had been enacted by the Legislature (section 148 of the *County Court Act* 1890), recognise appeals from interlocutory orders. See Schedule of Forms, form 50. In *Thompson v. Rowe*, 3 V.L.R. (L.), 55, an appeal from an interlocutory order, dismissing a summons for an apportionment of costs, was heard without objection. We are of opinion that an appeal will lie to this Court from orders of a County Court, interlocutory as well as final, in the sense which those terms must now be taken to bear, namely, that an order is final only where it is made upon an application or other proceeding, which must, whether such application or other proceeding fail or succeed, determine the action; and conversely, that an order is interlocutory where it cannot be affirmed that in either event the action will be determined. *Salamun v. Warner* (1891), 1 Q.B., 734 (C.A.) The preliminary objection therefore fails. The order of the judge involved a decision upon a question of law, viz., that no evidence had been given at the trial except such as necessarily went to show that the plaintiff would not have suffered the injury caused by his fall but for his own negligent act or default. Upon examination of the evidence we are clearly of opinion that the learned judge was wrong in so deciding, and that the case ought not to have been withdrawn from the jury on the ground that contri-

butory negligence was established against the plaintiff. The question was one for the jury, and the verdict of the jury ought not to have been disturbed. The appeal will be allowed, with costs. The order for a new trial will be set aside, and the application therefore will be dismissed with costs. The verdict found for the plaintiff below will be reinstated with costs of action.

Solicitors for the plaintiff appellant, *For.*

Solicitors for the defendant respondents, *Gillott Croker, Snowden & Co.*

(Before Higinbotham, C. J., Williams and Hood, J.J.)

ASKEW v. DANBY.

April 26th.

Motion to vary a judgment—Costs.

The Court has jurisdiction to vary its judgment up till the time of the drawing up of the order.

The party who renders a motion to vary the judgment necessary, must pay the costs of the motion.

This was a motion to the Court to vary its judgment in the action. At the trial of the action in the Court below, which took place before a jury of six, the jury assessed the plaintiff's damages at £5545, but on motion for judgment His Honor Mr. Justice a'Beckett disallowed £3800 of this amount and gave judgment for the plaintiff for £1745 with costs, except the costs of the issues upon which the defendant was successful. On appeal this judgment was varied by increasing the amount of it by £3800, but nothing was said about the costs, and though counsel on both sides were present the attention of the Court was not directed to the question. Subsequently on notice to the defendant the plaintiff moved the Court "That the judgment of this Court allowing the plaintiff's appeal herein be supplemented by adding thereto a direction that the judgment in this action be further varied by striking out so much thereof as relates to the costs of issues on which the defendant was successful, and that the defendant be ordered to refund to the plaintiff the sum of £77 15s. 8d., being the amount of taxed costs allowed in respect of the said issues, and paid by the plaintiff to the defendant, and that the defendant pay to the plaintiff the plaintiff's costs of the said issues when taxed."

Mr. Irvine in support of the motion. It was clearly an oversight by the Court not dealing with this question of costs when delivering judgment.

Mr. Topp to oppose the motion. I submit that the Court has no jurisdiction to vary its judgment. [HIGINBOTHAM, C.J.: Where the order is not drawn up the order may be varied.] If the Court is against me on this point I submit the plaintiff must pay the costs of this motion. [HIGINBOTHAM, C.J.: Was not this an oversight by the Court, and besides, this was a reserved judgment?]. Both parties were represented when judgment was delivered, and if a motion like this becomes necessary surely the person who makes it necessary should pay the costs occasioned by it.

HIGINBOTHAM, C.J.—We have no doubt as to our jurisdiction, and will make the order asked for, but under the circumstances the plaintiff must pay the

costs of this motion.

Solicitors for the plaintiff, *Brahe and Gair*.

Solicitors for the defendant, *Braham and Pirani*.

(Before Higinbotham, C.J., a'Beckett and Hood, J.J.)

SHORT V. DAVIDSON.

April 29th.

Notice of appeal, application to discharge.

Where a Notice of Appeal has been lodged, but no steps to have the appeal set down for hearing have been taken by the appellant within the time specified by the rules, the Court will not grant a rule nisi calling upon the appellant to show cause why such notice should not be discharged, unless the applicant can show that he is hurt by the existence of such notice.

This was a motion for a rule nisi calling upon the appellant to show cause why his notice of appeal should not be discharged. The plaintiff sued the defendant in the County Court at Benalla, and judgment in the action was given for the defendant. The plaintiff lodged notice of appeal, but took no further steps to have the appeal set down for hearing within the time limited by the rules under the *County Court Act* for so doing. After the expiry of such time, the defendant applied for the present rule.

Mr. Vasey in support.—The Court granted a similar rule to that now asked for in *Kelly v. Woodlands Saw Mills Coy.*, 12 V.L.R. 892, which was a case on all fours with the present one. [HOOD, J.—How are you hurt?] We desire to have the action terminated, and so long as the notice of appeal exists there is no finality. I would ask the Court to follow the case of *Kelly v. Woodlands Saw Mills Co.* [HOOD, J.—That decision appears to me to be based on an English decision which does not seem to be in point.]

Cur. ad. vult.

[On the same day the judgment of the Court was delivered by HIGINBOTHAM, C.J.]

HIGINBOTHAM, C.J.—This order must be refused. We do not think that it is necessary. We do not hold that the Court has no jurisdiction to grant an order nisi in such a case. We think there may be cases in which the Court has jurisdiction to prevent an appeal being put on the list; but we do not think in the present case that it is necessary for the purpose of enabling the defendant to obtain his costs that the rule nisi should be granted, and the effect of the rule would only be to increase the costs. The defendant is entitled to his costs under the order of the Court below, and there is no stay of proceedings. Without saying that the Court has no jurisdiction, we think that the order should be refused.

Solicitors for the applicant, *Lamrock, Brown & Hall*.

SUPREME COURT SITTINGS.

(Before a'Beckett, J.)

KAUFMAN V. MICHAEL AND ANOTHER.

12, 13, 18 May.

Agreement for a lease—Statute of Frauds—Part per-

formance—Specific performance.

Where the defendant verbally agreed to rent the plaintiff's house for five years, and in pursuance of that agreement and at the defendant's request the plaintiff made certain alterations in the house, specific performance decreed or at the defendant's election damages.

The plaintiff in this case, Jacob Bernard Kaufman, alleged in his statement of claim that on or about the 1st May, 1891, it was agreed between him and the defendants, Bernard Michael and Hilda Michael his wife, partly verbally and partly in writing, that the plaintiff should let to the defendants and the defendants should rent from the plaintiff for the term of five years, at a yearly rental of £130, the plaintiff's house, and that the plaintiff should make certain alterations and repairs to the house. That the plaintiff made the repairs and alterations, but that the defendants refused to carry out the agreement. The plaintiff claimed specific performance of the agreement, or in the alternative damages for breach of the agreement. The defendants in their defence set up the 208th Section of the *Instruments Act* 1890, and that it was not alleged that the defendant Hilda Michael had any separate property. The plaintiff in his reply alleged part performance of the agreement by making the repairs and alterations and removing certain fixtures from the house the defendants were then occupying and erecting them in the plaintiff's house.

It appeared that when the verbal agreement for the lease was made the defendants gave to the plaintiff a list signed by them of alterations which they wished to be done. Among these alterations was the papering of a room with paper to be chosen by Mrs. Michael, the removal of a hall lamp and water-heating apparatus from the house the Michael's were then occupying and fixing them in the plaintiff's house. Mrs. Michael chose the paper, and the plaintiff had it hung, and also carried out all the other alterations.

Mr. Wanliss for the plaintiff. There was ample part performance to take the case out of the Statute, and to enable the Court to decree specific performance.

Mr. Mitchell and *Mr. Piggott* for the defendants, cited *King v. Grimwood*, 17 V.L.R. 253; *Maddison v. Alderson*, 8 Ap. Ca. 467; *Poolbrooks v. Lawes*, 1 Q.B.D. 288; *Lavery v. Purcell*, 29 Ch. D. 508 at p. 518; *Polleykett v. Georgeson*, 4 V.L.R. (Eq.) 207; *Frame v. Dawson*, 14 Vesey 386.

Mr. Wanliss in reply.

Cur. adv. vult.

a'BECKETT, J.—This is an action to enforce specific performance of a verbal agreement to rent a house for five years, and acts of part performance are relied upon to take the case out of the Statute. These consisted in certain alterations made in the house, the papering of a room with wall paper chosen by the defendants, and the fitting up in the plaintiff's house of a hall lamp and water-heating apparatus taken from the defendant's house, the plaintiff having done these acts to comply with the conditions upon which the defendants had agreed to take the house. The defendants counsel contended that such acts were insufficient to

take the case out of the Statute, citing in support of this contention the case of *Frame v. Dawson*, 14 Vesey 386, and *Maddison v. Alderson*, 8 Ap. Ca. 467. In the former a party wall had been repaired under a verbal agreement to renew a lease, and this repair was relied upon as part performance, and held insufficient on two grounds, firstly, that it was an equivocal act and secondly that it admitted of compensation. The acts done in the case before me certainly admitted of compensation and a small sum would have sufficed to compensate. It is therefore said that specific performance should not be decreed. So far as the second reason for refusing relief in *Frame v. Dawson* is concerned a long series of subsequent authorities shows that this view is no longer entertained. As is observed in *Fry on Specific Performance* 2nd Edition p. 265. "Nothing can be clearer than that there are many Acts easily enough admitting of compensation which yet amount to such part performance as will enable the Court to enforce a parol contract." In other respects *Frame v. Dawson* is an authority for the plaintiff. It affirms the principle that the Act must be of such a nature that if stated it would of itself infer the existence of some agreement and then parol evidence is admitted to show what the agreement is. On the facts of that case it was held that the act done would not infer the existence of any agreement. The facts of the present case lead strongly to the inference that an agreement existed. When one man is found decorating his house with paper chosen by another and fitting into his own house fixtures taken from the house of the other some contract between them having reference to the house in which these things are done is at once suggested. The modern authority referred to by the defendant in no way conflicts with the old rule in reference to acts of this nature. In justifying the often questioned doctrine on the subject Lord Selbourne says at p. 476." It is not unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land (unless signed) it has in view the simple case in which he is charged upon the contract only and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of these *res gestæ* with the alleged contract does not depend upon mere parol testimony but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation to the scope of the Statute." Such a connection can reasonably be inferred here and I feel no doubt of the sufficiency of the acts to take the case out of the Statute. I have, however to consider whether a definite parol agreement has been proved on the evidence which is in some particulars conflicting. On the whole I think it was definitely agreed between the plaintiff and the defendant, Bernard Michael that on the plaintiff making certain alterations and improvements which were agreed upon and which were afterwards made he would take the plaintiff's house for five years from the 1st day of August, 1891, at the rent of £130 a year. This is not too vague an agreement to be enforced. The statement of claim alleges

that both defendants entered into the agreement. The wife signed her name to the memorandum of alterations required and took so active a part in the negotiations that the plaintiff not unreasonably treated her as interested in the contract. I think I ought not to refuse relief on account of this variance between the case pleaded and the case proved. It is a variance which has not caused any additional cost. The defendant, Bernard Michael admits that an agreement was made. The only difference between him and the plaintiff as to the particulars of the agreement is that the defendant asserts that he was to be at liberty to take the house for any term he might choose, long or short. I accept the plaintiff's version that the house was taken for a definite term of five years. The defendant gave as a reason for breaking his contract that the plaintiff had been rude to his wife. According to the evidence there was no rudeness to her, and it was admitted that the true reason for not carrying out the agreement was that Mrs. Michael did not wish to live in the house having been informed by her cook that it was unhealthy. The defendant naturally yielded to his wife's objection and was willing to pay for any actual expense occasioned to the plaintiff, but he refused to recognise that there had been any binding agreement to rent the house. In this he was wrong. In reference to one part of the case which is rather obscure on the evidence I wish it to be understood that I should not regard any act of the plaintiff as part performance of the agreement if he had done the act after he had been informed that the defendants refused to be bound by the agreement and did not desire the act to be done. According to Mrs. Michael's evidence the moving of the lamp and the heating apparatus was after she had told the plaintiff she would not take the house. The plaintiff had given instructions to have these things removed before Mrs. Michael's visit, and the removal appears to have been effected without any obstruction or objection on the part of the defendants. But apart from this act, and whenever this may have been done, the papering of the room and other alterations were undoubtedly completed before the defendants had given any notice of their intentions to break from the agreement, and would be enough in themselves to constitute part performance. As to the relief to be given, though there are no difficulties in the way of decreeing specific performance, I think that damages for non-performance will better meet the justice of the case, unless the defendant prefers specifically to perform the agreement. I have been referred to the case of *Lavery v. Pursell*, 29 Ch. D. 508, as showing that where the Court cannot possibly decree specific performance, it cannot give damages in an action such as this. In the present case there is no difficulty to prevent me from making a decree for specific performance, and as the Court can now administer both law and equity, it is competent for me to give the plaintiff the remedy in damages which he asks in the alternative. If the defendant prefers it, and gives notice to that effect to the plaintiff within one week from this date, I will decree specific performance

of the agreement already mentioned, but unless within that time he gives such notice and informs the Court that he has done so, damages will be given as herein-after mentioned. The damages sought are excessive, and I give none for the termination of the previous tenancy, which was before any agreement had been concluded with the defendant. I direct judgment to be entered against the defendant, Bernard Michael, for £130 damages and costs; the plaintiff to return to the defendant the lamp and heating apparatus within one week from the date of this judgment. No order made as to the defendant Hilda Michael. This judgment is not to be entered until the 25th instant. In the interval, if the parties can agree as to the value of the lamp and heating apparatus, I will give the plaintiff the option of paying the value instead of returning them. The defendant Bernard Michael can in the meantime consider whether he will apply to alter the judgment, and if he does I will draw up minutes for the usual decree for specific performance to be made with costs as against Bernard Michael.

Solicitor for plaintiff, A. R. Daly.

Solicitors for defendants, Braham and Pirani.

(Before Hood J.)

GEMMELL AND OTHERS v. GEMMELL.

May 27, 30.

Will—Legal estate—Trusts.

A by his will left his real estate to the use of trustees in trust for B during his life and subject thereto to the use of the person or persons who at B's death would be entitled thereto by descent in case she had died seized thereof in fee simple by purchase and intestate. B having died an action was brought for a declaration of the trusts of the will and for all necessary directions and enquiries:—Held that as there were no trusts to be declared the Court could not entertain the action.

The plaintiffs in this case were William Gemmell, the husband of Annie Gemmell deceased; Jeannie Colquhoun, Lely McEvoy, Annie Robina Gemmell and Jessie Ross Gemmell, sons and daughters of Annie Gemmell, and James Stuart Fenwick Gemmell, and Ida Maud Gemmell infant children of Annie Gemmell, who sued by their next friend Charles Edward McEvoy. The defendant was Peter Fenwick Gemmell the eldest son of Annie Gemmell.

The pleadings in this case contain most of the facts and are as follows:—

STATEMENT OF CLAIM.

The plaintiffs say that:—

1. Peter Fenwick, of Drummond Street, North Melbourne, in the Colony of Victoria made his will dated the 23rd May 1864 and thereby appointed John Gordon and William Lang executors and trustees thereof.

2. The said Peter Fenwick died on the 11th January 1866 leaving freehold land and hereditaments and personal estate in the Colony of Victoria and probate of the said will was granted to the said executors on the 10th May 1866.

3. Included in the said will is a devise in the words following, "I devise all my freehold land and hereditaments whatsoever situate in the Colony of Victoria to the use of John Gordon of No. 2 Carlton Street, Carlton near the City of Melbourne, and William Lang of No. 47 William Street in

the said city Lime merchant their executors, administrators, and assigns, during the life of my sister Annie the wife of William Gemmell of Sandhurst in the said colony in trust for her separate and inalienable use during her life and subject thereto to the use of the person or persons who at my said sister Annie Gemmell's decease would be entitled thereto by descent in case she had died seized thereof in fee simple by purchase and intestate if more than one in equal shares as tenants in common and his, her or their heirs and assigns for ever."

4. The said Annie Gemmell died on the 5th August, 1878, leaving her surviving the plaintiff, the said William Gemmell, her husband, her children the other plaintiffs, and the defendant, Peter Fenwick Gemmell, who is her eldest son.

5. The defendant claims that on the proper construction of the said devise, he is absolutely entitled in fee simple to all the freehold lands and hereditaments of the testator in Victoria, as the heir-at-law of the said Annie Gemmell, and that the same is not divisible amongst the plaintiffs and the defendant, according to the Statute of Distributions

The plaintiffs claim—

(1) That the trusts of the said will may be declared by this Honorable Court.

(2) All necessary directions and enquiries.

The defence states:—The defendant says—

1. He admits the 1st and 2nd paragraphs of the statement of claim.

2. He does not admit the 3rd paragraph, except subject to reference to the will therein mentioned when produced.

3. He admits the 4th and 5th paragraphs.

4. He submits that there are no trusts of the will to be declared, and no directions to be given or enquiries to be made, but if the Court shall be of the contrary opinion, then he submits that the trustees mentioned in the will are necessary parties to the action, and he also submits that if he is not entitled to the lands as heir-at-law, the only persons entitled are the children of Annie Gemmell, to the exclusion of the husband, the plaintiff, William Gemmell.

Upon this there was joinder of issue. Another paragraph of the will was as follows:—"If neither of my said three sisters shall survive me, then I direct that my said personal estate shall be divisible amongst the next of kin of my said last-named three sisters living at the time of my decease (exclusive of any husband), in a course of distribution according to the statute."

Mr. Higgins for the defendant. The first objection is fatal. The effect of the will is to give the legal estate to some person, and the question who that person is ought to be settled in the ordinary way by an action of ejectment or trespass. There are no trusts of the will, and therefore the Court cannot declare them. In this form of action the Court will not interpret a will. *Tierney v. Halfpenny*, 9 V.L.R. (L.) 152.

Mr. Goldsmith for the defendant. This is an action to declare the meaning of a clause of a will. It is for the Court to declare who are the persons entitled under this particular clause. We do not ask the Court to put any person in possession. This Court dispenses both law and equity together, Or 25 r. 5 of the *Judicature Rules*, and therefore can declare what are the legal rights of persons under this clause.

Mr. Higgins in reply. Order 25, r. 5 of the *Judicature Rules* carries the case no further. This rule comes from the English *Chancery Procedure Act*, and under that Act in order to get a declaratory judgment it was necessary to bring an administration action. *Morgan's Chancery Acts and Orders* 5th Ed., p. 197. This action cannot be arranged by consent as some of the plaintiffs

are infants, and the Court having no jurisdiction they would not be bound, *Webb v. Bing*, 8 De G. M. & G., 633. This Court cannot make a decree declaratory of a merely legal right, *Trustees of Birkenhead Docks v. Laird* 4 De G. M. and G. 732. *De Windt v. De Windt* L.R., 1 H.L. 87, 92.

Cur. adv. vult.

HOOD, J. The statement of claim in this case set out certain clauses in the will of Peter Fenwick deceased and states that the defendant claimed that on the proper construction thereof he was absolutely entitled in fee simple to all the freehold lands and hereditaments of the testator in Victoria, to the exclusion of the plaintiffs. In the defence the objection was taken that there are no trusts of the will to be declared and no directions to be given or enquiries to be made, and at the trial Mr. Higgins for the defendant urged that the case should not be entertained but that the legal title to the land should be determined in the usual way by action of ejectment or trespass. Several authorities were cited in support of this contention, and the only answer put forward was that these decisions were before the *Judicature Act* and Or. 25 r. 5 of the *Judicature Rules*. But these decisions were pronounced at a time when sec. 50 of the *Chancery Procedure Act* 1852 was in force which is identical with Or. 25, r. 5, and they are referred to in the latest text books. I think, therefore, I must follow them. As to the effect of the provisions of the *Judicature Act* relating to the administration of Law and Equity by the one tribunal, I do not think they apply. Those provisions can only apply to proceedings in which both legal and equitable rights can be given effect to, and in the present instance I have not before me either the proper parties or the proper pleadings. I accordingly dismiss the claim but without costs.

Solicitors for plaintiffs, *Brahe and Gair*; solicitors for defendant, *Malleson, England and Stewart*.

(Before Hodges, J.)

NANKIVELL V. BENJAMIN AND OTHERS.

March 28, 29, 30,
May 31.

Company—Ultra vires—Directors—Parties.

Where a company enters into contracts alleged to be ultra vires, with third parties, the proper party to sue for the recovery from the directors of money paid under these contracts, is the company, unless special circumstances be proved, as for example that the company refuses to sue. If relief is claimed against the third parties they should be made parties to the action. Action to declare certain contracts void and for consequent relief.

The facts sufficiently appear in the judgment.

At the close of the plaintiff's case there was a motion for a nonsuit.

Mr. Purves, Q.C., Mr. Higgins, and Mr. Mitchell, for the defendants, Benjamin, McGee, Phillips, and Withers. The proper party to sue is the defendant company. *Hare v. London and N. W. Ry. Co.* 1 J

and H. 252; *Russell v. Wakefield &c., Waterworks Co.*, L.R. 20 Eq. 474; *Bryson v. Warrick &c., Ry. Co.* 4 De G. M. and G. 711. There is no case where directors have been held liable for the honest misapplication of a company's funds. *Pickering v. Stephenson*, L.R. 14 Eq. 342; *Studdert v. Grosvenor*, 33 Ch. D. 528; *Faure Accumulator Co.* 40 Ch. D. 141. The persons with whom the defendant Company made the contracts should be before the Court.

Mr. Topp and Mr. Waigall, for the defendant. Elliot supported the motion.

Mr. Irvine and Mr. Wanliss, for the defendant, the Imperial Banking Company, offered no arguments.

Dr. Madden and Mr. Isaacs for the plaintiff. The question of *bona fides* does not touch the matter. *Cullerne v. London &c., Building Society*, 25 Q.B.D. 485; *re Oxford Benefit Building Society*, 35 Ch. D. 502. This action is properly brought by the plaintiff, on behalf of all the shareholders other than the defendants. *Foss v. Harbottle*, 2 Ha. 461; *Kernaghan v. Williams*, L. R. 6 Eq. 228; *McDougall v. Gardiner*, 1 Ch. D. 13; *Hoole v. Great Western Ry. Co.* L.R. 3 Ch. 262. No other persons are necessary as defendants, for we say the agreements made by the directors were *ultra vires*, and therefore void, and we claim as damages against the directors the money paid by them under those agreements.

Mr. Higgins, in reply, cited *Robertson v. Wealth of Nations*, 14 V.L.R. 584; *Duckett v. Glover*, 6 Ch. D. 82; *Mason v. Harris*, 11 Ch. D. 97; *Hardy v. Wilson*, 8 V.L.R. (Eq.) 289; *London Financial Association v. Kelk*, 26 Ch. D. 107; *Pagin and Gill's case*, 6 Ch. D. 681.

Cur. adv. vult.

HODGES, J.—The plaintiff in this case is John Nankivell, who states, that he sues on behalf of himself, and all the other shareholders of the Imperial Banking Co., except the individual defendants. The defendants are the Imperial Banking Company, Sir Benjamin Benjamin, John McGee, Hugh Miles Phillips and George Withers, who were directors of that company, and George Elliot, who was a vendor of certain property which was a part of the subject matter of this action. It appears that in the earlier part of June, 1888, the directors desiring to commence speculating in land on behalf of the Company, after examining the memorandum of association to see if the company had power to transact such business took steps to alter the articles of association in order to enable the company to so speculate, and with this object in view there was passed at an extraordinary general meeting of the shareholders held on the 13th June, 1888, a special resolution in the following words:—"The directors shall have power to invest the funds of the Company in the purchase of real estate, and to re-sell the same, &c." That resolution was confirmed at a meeting of shareholders duly convened on the 28th June, 1888. But before that, the manager of the Company, James Clarke, who was also a partner in a firm of estate agents, Bradley & Curtain, was negotiating with George Elliot for the purchase of property at the corner of King and Lonsdale streets, and had men-

tioned the matter to several of the directors of the Company, but casually only, and not at a meeting of the board of directors. On the 26th June, before the matter had been mentioned at any meeting of the board of directors, and before there was any agreement even orally by the Company to purchase, Clarke entered into a contract with Elliot to purchase the land. This contract purported to be made, not on behalf of the Company, but by Clarke himself. And I find as a fact that this contract was made by Clarke on his own behalf and not intending to act as agent of the Company, but with knowledge that at that time he was not authorised to act as agent of the company, and I believe that Elliot was in effect told that the directors had not at that time power to make or authorise that contract, and that therefore Clarke was making the contract himself; and I think it was intended that the Company should have thereafter the benefit of the contract, and I think that also was told to Elliot. The firm of Bradley & Curtain received a commission of £480 on that transaction. A deposit of £2000 was paid by a cheque drawn by Bradley & Curtain on the defendant Company. At the time this cheque was paid the account of Bradley & Curtain was overdrawn beyond £2000. I have expressly avoided expressing any opinion as to whether Clarke made this contract on his own behalf or as agent of his firm, but there is evidence which I am unable to understand, and the view I take renders it unnecessary to decide whether he bought for himself or as agent of his firm, with the intention that he should transfer the land to the Company when the Company had power to take it. The land having been bought there was a meeting of the board of directors on the 3rd July, and by the minutes of that meeting it appears to have been represented to the directors by Clarke that the purchase had been made by Bradley and Curtain who were willing to transfer to the Company their rights and liabilities under the contract, and for this liberal offer the firm received the thanks of the directors. This transfer was never executed, but instead of this Clarke executed on the 18th January, 1889, a declaration that he had bought this property on behalf of the defendant Company, and by the same declaration the Company similarly acknowledged and declared. In my opinion that is not a correct version of the transaction which took place. What took place was a purchase by Clarke for himself. A payment of £6000 was made on the 26th July 1888, by cheque, and on the 8th August Bradley and Curtain sent to Gillott, Croker, and Snowden two promissory notes of Clarke's, not the Company's, for £16000 each. Some payments under the contract were afterwards made by the Company, which in the view I take are not necessary to specify. On these facts the plaintiff asks for a declaration that the contract was void and illegal as being *ultra vires* the Company; and upon the ground that it was *ultra vires*, the plaintiff asks that the individual defendants, other than Elliot, restore to the Company all the money paid in respect of that contract with interest thereon, and that the Company be

restrained from making any further payments on the contract. The plaintiff further asks that Elliot be directed to restore to the Company all monies received by him under the contract. It was objected by the defendants *inter alia* that, as the Company was in liquidation, and the liquidator supported the plaintiff's case, no injunction was necessary, and if no injunction was necessary, then the other relief asked by the plaintiff could only be granted at the suit of the Company and not at the suit of a member of the Company; and secondly, that the relief claimed by the plaintiff could not be granted unless the members of the firm of Bradley and Curtain were made parties to this suit. Without expressing any opinion as to the first objection, I am of opinion that the second objection is good. The foundation of all this relief is based upon that contract being void as being illegal and *ultra vires*. If that contract be not *ultra vires*, then the whole claim to relief vanishes. If it be *ultra vires*, then the plaintiff may be entitled to all the relief consequent upon it. But in my opinion it would not be right to declare a contract void as being illegal and *ultra vires* without hearing one of the parties to the contract who has an unmistakeable and direct interest in maintaining that that contract is not illegal and *ultra vires*. And if authority be wanting for that proposition, it may be found in the case of *Russell v. Wakefield & Co. Waterworks Co.* (L.R. 20 Eq. at p. 479) per Jessel, M.R. The subject matter of this action is an agreement between the defendant Company and another person and it is necessary in this case to bring that other person before the court, whether that person or persons be James Clarke or the firm of Bradley and Curtain. Consequently, I think that so far as the plaintiff asks relief with regard to this contract I cannot give it to him without the other persons being before the court. The next claim the plaintiff makes is in respect of a contract bearing date the 5th October 1888, made between the defendant company on the one hand and John Curtain the liquidator of the Royal Land Company on the other hand. By this agreement the defendant company purchased from the liquidator all the lands and hereditaments mentioned in a schedule to the agreement with the rights and liabilities thereto belonging for the sum of £6250 to be paid for by a certain number of shares of the defendant company. If the defendant company has paid all the money that has to be paid under that contract, and this is an action or proceeding to recover back that money and for a direction to have it paid, then in my opinion the plaintiff is the wrong person to sue. The proper person to sue would be the defendant company and not the plaintiff. This is shown by some of the language which I have already read in *Russell v. Wakefield Waterworks Co.* and also appears to have been decided in *Gray v. Lewis and Parker v. Lewis* L.R. 8 Ch. 1035 at p. 1050 per James L.J. I do not mean to say that is a rule which cannot yield to special circumstances. For instance, if it were not possible to get the company to institute proceedings, or if it were shown that a majority of the shareholders were against taking proceedings, but in the absence of such circumstances that

general rule applies to this case. On the other hand if the money has not been paid and the plaintiff seeks a declaration that the contract is invalid, then the same objection that answered the previous part of the claim answers this also, viz., that the proper persons have not been brought before the court. There was then a third subject matter of claim against the directors. With regard to this part of the claim it appears that the directors made an arrangement with Bradley and Curtain by which they advanced money on a credit entry which enabled them to make a debit entry and so have certain shares paid up to £1. I do not propose here to decide whether there was any advance in the proper sense of the term; no money went out of the coffers of the company and no money went into the pockets of Bradley and Curtain. But there was an agreement by which the company purported to advance to Bradley and Curtain £21,000, enabling them to have their shares at that time paid up to 2s. 6d., paid up to £1, and the scrip left with the company as security for payment by Bradley and Curtain of that advance. In this case if it is only to recover the money I think the same objection as applies to the last claim applies to this and the proper plaintiff would be the company. If further relief is sought then Bradley and Curtain ought to be parties to this suit, and I think that probably the proper relief would be to cancel the whole transaction, and put the parties exactly as they were. The Company have got the scrip, the credit, and debit entries and the whole transaction could be wiped out. But in order to wipe it out the proper persons must be before the court. In either way the action is wrong. If the action is to recover the money paid the Company ought to be plaintiffs, if other relief is sought the proper persons are not parties. I therefore think that I ought to do what Webb J. did in a previous action,—strike out the case for want of parties. I shall therefore strike out the case without costs as against all the defendants, except Elliot, but as I think he had a valid contract with Clarke and as he has been dragged into this case without his fault I give him costs.

Solicitors for plaintiff, *Mr. Manton*.

Solicitors for defendants, Benjamin, McGee, Phillips, and Withers, *Hart and Benjamin*.

Solicitors for defendant, Elliot, *Gillott and Co.*

Solicitors for defendant, The Imperial Banking Co., *Bolger and Miller*.

PROBATE JURISDICTION.

(Before Hodges, J.)

IN THE ESTATE OF NANCY WILLIAMS.

May 26.

Administration—Caveat—Costs.

Where an executor advertised his intention to apply for probate but on a caveat being lodged took no further steps in the matter, on notice to him administration, was granted to the caveatrix until the will was brought in and proved.

Costs were not given against the executor as no express

notice was given that such an application would be made.

Nancy Williams died on the 5th March 1891 having on the 26th February 1891 executed a will leaving all her property to a stranger. On the 9th March 1891 an advertisement appeared in the *Argus* to the effect that Richard Parker, the executor, appointed by that will would apply for probate. On 2nd April 1891 a caveat was lodged by Mrs. Mary Jane McKee, who was a sister of the testator, and the only surviving next of kin in Victoria. Since then Richard Parker has taken no further steps in the matter. Mrs. McKee now applied for administration, or in the alternative for administration until the will should be brought in and proved. Notice was given to Richard Parker of this application, and that the Court would be asked "to make such order as to costs as shall appear just."

Mr. Hayes for the motion.—We ask for costs against Richard Parker on the authority of *In the estate of Jones*, 8 V.L.R. (I. P. & M.) 26.

HODGES, J.—Administration granted until the will be brought in and proved. No order for costs, as I think Richard Parker should have had express notice that an application would be made that he should be ordered to pay the costs of this motion.

Proctors, Connelly, Tatchell, and Paling.

(Before a'Beckett, J.)

IN THE WILL OF GEORGE HILL.

June 2, 6.

Will—Caveat—application for jury.

The proper time to apply for a jury in a probate action is the day appointed for the return of the order nisi—Neither of the parties has a right to a jury, and it is a matter entirely within the discretion of the Court—Where the caveator applied for a jury and to be allowed to support his application by affidavits, both applications were refused on the ground that the executors objected.

On the return of an order *nisi* calling on George Russell, the caveator, to show cause why probate of the last will of George Hill should not be granted to Henry Lockett and Richard Russell, the executors appointed by the said will.

Mr. Davis for the caveator applied for a jury, and that he might be allowed to support his application by affidavits.

Mr. Moule, for the executor and executrix, objected to a jury being granted. This application should be supported by evidence on affidavit; *In re Dixon*, 13 A.L.T. 157; *In re Towt*, 13 A.L.T. 138; *In re Sturrock*, 13 A.L.T. 241.

Cur. adv. vult.

A'BECKETT, J.—In this case an order *nisi* was obtained under section 19 of the *Administration and Probate Act 1890*. On the return day the caveator asked that the case might be tried by a jury under section 23. Some uncertainty has prevailed as to when an application of this kind ought to be made, and I therefore consulted my brother judges on the subject. They agree with my view that the proper time is on the return day when the caveator appears, and when

according to the present practice, a day is fixed for hearing, or the case is directed to be put in some list. In saying that this is a proper time for making the application they do not wish it to be supposed that they recognise any right of the parties to have a case so tried. Even if both sides asked for a jury the court would not be bound to accede to the application, and if it were refused the judge, who heard the case night, nevertheless, afterwards direct an issue at his own discretion. Section 23 was part of an act which came into force when probate cases were heard by the equity judge, and gave him power to direct an issue for his own satisfaction. The late Mr. Justice Molesworth on two or more occasions after himself hearing evidence directed an issue under this section on his own motion, but it was never treated as giving the parties a right to supersede the ordinary mode of trial at their own instance. In the case with which I have now to deal the executors object to having the case heard by a jury and this I think is sufficient reason for declining to have one. For the same reason I do not accede to the suggestion of counsel for the caveator that he should be at liberty to support his application by affidavits. It was made at the right time but I refuse it.

Proctors for the executors, *Grant and Son*; proctor for the caveator, *Marshall Lyle*.

IN CHAMBERS.

(Before a'Beckett, J.)

BROWNE V. ROYAL PERMANENT BUILDING SOCIETY.

8th, 10th June.

Building Societies' Act 1890 (No. 1068) sec. 29 (III.) Building Society—Voluntary dissolution—Judgment against Society—Stay of execution—Proceedings for voluntary dissolution under sec. 29 (III.) of Act No. 1068 are not equivalent to the voluntary winding-up of a company, and do not deprive a judgment creditor of his right to enforce his right by execution.

Application on behalf of the defendant for an order that execution and all further proceedings be stayed, on the ground that the defendant Society was in course of voluntary dissolution under the provisions of Sec. 29 of the *Building Societies Act 1890*.

Mr. Weigall in support.

Mr. Isaacs to oppose.

HIS HONOR said:—I will consider the matter.

HIS HONOR, on a subsequent day, said:—This is a case in which judgment has recently been obtained against the Society, and immediately afterwards a summons was heard on an application by the defendant for an order that execution and all further proceedings in the action should be stayed on the ground that the Society was in course of voluntary dissolution

under the provisions of Sec. 29 of the *Building Societies Act 1890*. In support of the application it has been said by Mr. Weigall that this Society has availed itself of one of the provisions of Sec. 29, viz., Sub-sec. 3. This Sub-section provides: "In cases where no manner is prescribed by its rules for dissolution with the consent of three-fourths of the investing members holding not less than two-thirds in value of the investing shares in the Society then current testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth (a) The liabilities and assets of the Society in detail. (b.) The number of members and the amount standing to their credit in the books of the Society. (c.) The claims of depositors and other creditors and the provision to be made for their payment. (d.) The intended appropriation or division of the funds and property of the Society. (e.) The names of one or more persons to be appointed trustees for the special purpose of winding up the Society and their remuneration. Alterations in the instrument of dissolution may be made with the like consent testified in the same manner. The instrument of dissolution and all alterations therein shall when signed by the required number of members be transmitted to the registrar together with a statutory declaration by the secretary verifying the signatures thereto, and that it is signed by the required number of members, and shall thereupon be registered by the registrar, and shall be binding upon all the members of the society." In support of the application it was suggested that proceedings under this section were equivalent to a voluntary winding up, and that a society being dissolved under this section, should have the same protection from the claims of its creditors, as a company receives which is being voluntarily wound up. I see no reason to adopt this argument. Even assuming that all the provisions of the sub-section have been complied with, I would still say that the sub-section merely provides a means by which a society or its members may settle among themselves a scheme for dissolution, but this cannot bind anyone else. It would be an extraordinary thing, if, by proceeding under this sub-section, they could frustrate the legal rights of a creditor. Creditors are under no statutory obligation as they are under in the case of a company being voluntarily wound up. I do not regard this scheme for dissolution as obstructing the rights of creditors any more than the right of the creditor of a private person would be obstructed, where his debtor had made some arrangement with certain of his creditors. It is therefore, in my opinion, quite unnecessary to enquire whether the proposed scheme satisfies the requirements of the act. It has been suggested that I have a discretion in the matter, but even if I had I am not sure that the signatures to the instrument of dissolution have been properly executed. All I decide, and without doubt, is that a court ought not to obstruct a creditor, by reason of any arrangement made by a society under this section. I refuse the application with £3 3s. costs. I certify for counsel.

Solicitors for plaintiff, *Crisp, Lewis and Hedderwick*, for defendant, *Davies, Price and Wighton*.

(Before a'Beckett J.)

HARVEY V. STOUT AND OTHERS.

14th June.

Rules of Supreme Court 1884, Order IV. r. 1—Order XIX. r. 4—Specially endorsed writ—Signature—Agent—Order IV. r. 1 treats the agent of the solicitor as the solicitor of the client, and therefore the agent is the person under Order XIX. r. 4 who is meant by "the solicitor," and he and not his principal must sign the endorsement to a specially endorsed writ.

Application on behalf of the plaintiff under order XIV. r. 1, for leave to sign final judgment.

The writ, which was otherwise specially endorsed was signed by W. Higgins, and contained the following endorsement.

"This writ was issued by Charles Samuel Price, of Normanby Buildings, Chancery Lane, Melbourne, whose address for service is Normanby Buildings, Chancery Lane, Melbourne, agent for W. Higgins of Geelong, solicitor for the said plaintiff who resides at Portarlington.

Mr. Hayes to oppose.—There is a preliminary objection. Order IV. r. 1, provides that where the solicitor who issues the writ is the agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. Then order XIX. r. 4 provides that when a pleading is not settled by counsel it shall be signed by the solicitor. A specially endorsed writ is a pleading and the solicitor means the solicitor who issued the writ, and therefore this writ should have been signed by Mr. Price the agent and not by Mr. Higgins the principal.

Mr. Anderson in support. The writ is to be signed by the solicitor, that must mean the principal solicitor and not the agent. The very endorsement treats Mr. Higgins as the solicitor for the plaintiff. Even if that be not so, the writ was issued on the 17th May, 1892, after the passing of the Amalgamation Act, and there is nothing to show that Mr. Higgins did not sign the endorsement in his character of counsel, as he could do under Order XIX. r. 4.

His Honor said: I have to find out the meaning of the words "the solicitor." On looking at Order IV. r. 1, I find that it is provided that "the solicitor of a plaintiff suing by a solicitor shall indorse upon the writ of summons the address of the plaintiff, and also his own name or firm and place of business;" then at the end of the rule it is provided that "Where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor." I may read this rule as providing that where the solicitor of the plaintiff is only the agent he shall add to his own name and address the name and address of the principal solicitor. This rule treats the agent as the solicitor for the plaintiff, and therefore the agent must be the person under Order XIX. r. 4 who is meant by the solicitor, and he must sign the endorsement. As this writ has not been signed by the agent, but by the principal solicitor, I think it does not fulfil the requirements of Order XIX.

r. 4, and I therefore dismiss the summons with £3 3s. costs, and I certify for counsel.

Solicitors for plaintiff, *Davies, Price and Wighton*: for defendants, *Taylor, Buckland and Gates*.

(Before Holroyd, J.)

BEESTON V. DONALDSON, RIGGALL (Claimant).

9th, 30th March.

Instruments Act 1890 (No. 1103), sec. 132—Bill of Sale—Assignment for the benefit of creditors—Registration as a Bill of Sale—What constitutes an assignment for the benefit of creditors so as to bring the document within the provisions of sec. 132 of Act No. 1103.

Sheriff's interpleader.

The claim was based on the following deed:—

"This indenture, made the fifteenth day of February, one thousand eight hundred and ninety-two, between Joseph Donaldson, of Melbourne, stock and share broker, of the first part, William Riggall, of Melbourne, a solicitor (hereinafter called "the said trustee") of the second part, and the several persons, firms, and corporations whose names appear in the first column of the schedule hereunder written or hereunto annexed, and all others (if any) the creditors of the said party hereto of the first part of the third part. Whereas the said Joseph Donaldson is indebted unto the said several firms, persons, and corporations whose names are set out in the first column of the said first schedule hereunder written or hereunto annexed, and being all his creditors, in the several amounts or sums of money set in figures opposite to their respective names in such schedule, and whereas it has been agreed that the said Joseph Donaldson shall convey and assign all his real and personal properties and estates whatsoever and wheresoever unto the said trustee, his heirs, executors, administrators, and assigns upon trust for the benefit of all the creditors of the said Joseph Donaldson, now this indenture witnesseth that in pursuance of the said agreement in this behalf, and in consideration of the premises, he the said Joseph Donaldson doth by these presents grant, release, assign and transfer unto the said trustee, his heirs, executors, administrators and assigns, all and singular the lands, tenements and hereditaments both freehold and leasehold whatsoever and wheresoever of him the said Joseph Donaldson, or of or to which he or any person or persons whomsoever in trust for him is seized, possessed, entitled or interested in possession, reversion, remainder, expectancy or otherwise for any manner of estate or interest legal or equitable whatsoever, together with all rights, members, and appurtenances to the same respectively belonging or appertaining, and also all the moneys, bills, debts, credits, and other choses in action whatsoever of or belonging or due or owing to the said Joseph Donaldson, and all and singular the merchandise, stock-in-trade, furniture, goods, chattels, effects, book debts, credits, sums of money, securities for money, choses in action, and personal property and estate whatsoever and wheresoever of him the said Joseph Donaldson, or of, in, or to which he or any person or persons in trust for him is possessed or entitled at law or in equity for any estate or interest whatsoever, together with all books of account, receipts, vouchers, orders, and all other papers and writings whatsoever in any way relating to his real and personal estates, affairs, and concerns respectively. And all other the real and personal estate, property and effects whatsoever and wheresoever of or belonging to the said Joseph Donaldson, or of or to which he or any person or persons in trust for him is seized, possessed or entitled at law or in equity of any estate or interest whatsoever. And all the estate, right, title, interest, benefit, claim and demand whatsoever of him the said Joseph Donaldson at law or in equity of, in, or to the said premises respectively. To have, hold, receive and take all and singular the said real and personal estates, properties and premises respectively hereinbefore expressed to

be hereby granted and assigned unto and to the use of the said trustee, his heirs, executors, administrators and assigns according to the legal natures and qualities thereof respectively absolutely nevertheless, upon and for the trusts, intents and purposes, and with, under, and subject to the powers, provisions, agreements and declarations hereinafter expressed and declared of and concerning the same respectively. And the said Joseph Donaldson doth by these presents absolutely and irrevocably constitute and appoint the said trustee and his executors, administrators or assigns to be the true and lawful attorney of him the said Joseph Donaldson, in his name (if necessary) to ask, demand, sue for, recover and receive of and from all and every the person and persons liable or compellable to pay or account for or to transfer or deliver the same respectively all and singular the goods, moneys, credits, effects, books, papers, writings, receipts, orders, vouchers and chattels hereinbefore expressed to be hereby assigned, and upon payment or receipt thereof respectively good and sufficient receipts, releases and other discharges for the same to sign, give and execute, and on non-payment, non transfer, or non-delivery thereof respectively all such actions, suits or other proceedings to bring, commence and prosecute as he the said trustee shall think fit, and to settle and adjust, compromise and compound, or submit to arbitration any debt, claim or demand, due, owing or belonging to the said Joseph Donaldson in such manner and upon such terms as the said attorney shall think proper, and to execute, sign and do all or any such further deeds, instruments, matters and things as the said attorney shall deem necessary for more effectually assuring the said premises or any part thereof unto him the said trustee, his executors or administrators, or for enabling him or them to carry out the trusts and provisions of these presents, or which is or are hereinafter covenanted to be executed or done by the said Joseph Donaldson, and for all or any of the purposes aforesaid one or more substitute or substitutes under the said attorney to appoint, and at pleasure to revoke or displace and another or others to substitute, and generally to do, execute and perform all such other acts, deeds, matters and things whatsoever in or about the premises or in relation thereto as the said attorney shall think expedient. And it is hereby agreed and declared by and between the said parties to these presents that the said trustee, his heirs, executors or administrators shall stand and be possessed of and interested in the said real and personal estates, property and premises respectively hereinbefore expressed to be hereby granted, released, assigned or assured upon or for the trusts, intents and purposes, and subject to the powers, provisions, and declarations herein expressed and declared of and concerning the same, that is to say upon trust at his discretion to sell and dispose of all and singular the said real and personal estates, properties and premises respectively, or such part or parts thereof respectively, as is or are of a saleable nature either together or in parcels, and either by public auction or private contract to any person or persons whomsoever with power to allow any time for payment of the whole or any part of the purchase-money, and either with or without taking any security for the same. And as to the said real estate and chattels real, subject or not to any special or other conditions of sale as to the title, or evidence or commencement of title or otherwise, and in such manner in all respects as he shall think fit or expedient, with full power and authority for him to buy in all or any of the said premises at any auction, and to rescind or vary the terms of any contract that may be entered into for the sale thereof or any part thereof, and to resell the said premises or any of them or any part thereof respectively in like manner as aforesaid without being answerable or accountable for any loss or diminution in price, expense, or other damage, which may happen or arise thereby, or in consequence thereof, and to execute and do all such assurances and acts for effectuating such sale, and sales, as may be necessary or expedient. And upon trust with all convenient speed to call in collect, receive, and convert into money such parts of the said personal estates and premises as are not in their nature saleable or otherwise realise the said trust estate and every part thereof in such way and manner as he shall deem proper or expedient. And it is hereby further agreed and declared that the receipts in

writing of the said trustee, his executors, administrators, or assigns, shall be effectual discharges to all and every purchasers or purchaser, persons or person whomsoever who shall pay any moneys under or by virtue of these presents, or the trusts or powers herein contained for so much money as in such receipts shall be expressed to be received, and that the persons or person paying such moneys as aforesaid shall not be bound or obliged to see to the application thereof or any part thereof, nor be answerable or accountable for the loss, misapplication or nonapplication thereof, or of any part thereof. And further that the said trustee, his heirs, executors, administrators, or assigns, shall stand and be possessed of the moneys to arise and be produced by and from such sale, receipts, and conversions respectively as aforesaid, and also of any other moneys which may come to his hands under or by virtue of these presents. Upon trust in the first place to pay and discharge thereout all costs, charges, and expenses of negotiating and arranging, preparing, pursuing, completing, notifying, and advertising, and registering these presents and incidental thereto, and consequent thereon. And also all proper law charges, whether such law charges be the charges of the said William Riggall or his firm in connection with business done by him for and on behalf of the creditors of the said Joseph Donaldson prior to the execution of these presents and also a fair and reasonable commission or remuneration to the said Joseph Donaldson for supervising the realization of the property of the said Joseph Donaldson, if he is appointed supervisor for that purpose. And also the costs, charges, and expenses of and incidental to the execution of the trusts and provisions of these presents, including therein a commission to the said trustee of five pounds per centum on the gross amount to be received by him under or by virtue of these presents (except on any moneys now in the Federal Bank to the credit of the said Joseph Donaldson) for his time and trouble in and about the carrying out of the trusts of these presents, and in the next place to apply the same moneys in or towards payment of all the debts and sums of money owing by the said Joseph Donaldson, or to the persons and parties who shall sign and execute these presents, and whose names appear as creditors in the said schedule hereunder written or hereunto annexed, and to all other (if any) of the creditors of the said Joseph Donaldson, and of each of them, who shall sign and execute these presents rateably, and in proportion to the amount of the debts or sums of money owing to such creditors respectively, without any priority or preference whatsoever. And after all such payments as aforesaid upon trust to pay over the residue or surplus (if any) which shall then remain to the said Joseph Donaldson, or his executors, or administrators. And the said Joseph Donaldson doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said trustee, his heirs, executors, administrators, and assigns respectively, in manner following (that is to say) that he the said Joseph Donaldson will not revoke, annul, or make void the power hereinbefore contained nor demand sue for, accept, receive, release, or discharge all or any part of any debt or sum of money, or choses in action due owing or unpaid, or belonging to him from or by any person or persons, or corporation or corporations whomsoever, or do or omit or suffer to be done any act, deed, matter, or thing whatsoever, whereby or in consequence whereof the said trustee, his executors, administrators, or assigns, can, shall, or may be impeded, delayed, hindered, or prevented in or from recovering, receiving, or compelling payment of the whole or any part of the said debts or sums of money or choses in action respectively. And also shall and will from time to time and at all times hereafter when thereunto required by the said trustee, his executors, administrators, or assigns, make and give written and other explanations and disclosures of and concerning the transactions, affairs, property, rights, credits, and debts of him the said Joseph Donaldson for better enabling him the said trustee, his heirs, executors, administrators, or assigns, to act in and carry out the trusts of these presents. And also that he the said Joseph Donaldson shall, and will in all things aid and assist the said trustee, his heirs, executors, administrators, and assigns, in carrying out and winding up the affairs and concerns of the said trust estate in such manner as may be required by him. And further that

it shall be lawful for the said trustee, his heirs, executors, administrators or assigns, henceforth, and at all times hereafter, peaceably and quietly to enter into and upon all and every the messuages, tenements, and hereditaments, wherein any of the goods, chattels and effects hereby assigned now are or henceforth shall be and to take possession of, and hold, retain, and dispose of the same, and also to hold and enjoy all and singular other the said real and personal estates, properties, and premises, respectively, hereinbefore expressed to be hereby granted, released, assigned or otherwise assured, respectively and every part thereof respectively according to the legal nature thereof respectively. Upon the trusts and for the intents and purposes of these presents without any let, suit, trouble, denial, interruption, claim and demand whatsoever of, from, or by the said Joseph Donaldson, or any person or persons whomsoever. And further that the said Joseph Donaldson, his heirs executors or administrators, shall and will from time to time, and at all times hereafter upon the request of the said trustee, his executors, administrators or assigns, but at the expense of the said Trust estate, until sale shall be made thereof under the power for that purpose hereinbefore contained and afterwards at the expense of the person or persons requiring the same, make, do, and execute or cause to be made, done, and executed, all such acts, deeds, matters, and things whatsoever, for the better or more satisfactorily assigning, conveying, or otherwise assuring the said real and personal estates, properties, and premises respectively and every part thereof unto the said Trustee, his heirs, executors, administrators or assigns, according to the nature of the same estates and premises respectively as by him or by his Counsel shall be reasonably required. And it is hereby agreed and declared that it shall be lawful for the said Trustee, his executors, administrators, and assigns, and he is hereby empowered at any time and from time to time when he shall think proper so to do, to call, or convene at any time or place he may think proper, a general meeting of the creditors of the said Joseph Donaldson for the purpose of taking or receiving their instructions or direction concerning any transaction, matter or thing whatsoever affecting or which may affect the estate and effects hereby conveyed and assigned or any part thereof respectively or the disposal, collection, administration or distribution thereof or the claims or interests of any person or persons, corporation or corporations, or creditor or creditors in respect of any property or debt claimed or otherwise in relation to the trusts and provisions herein contained. And also that notwithstanding anything hereinbefore contained it shall be lawful for the said Trustee his executors, administrators or assigns if he shall think proper so to do, to allow the said Joseph Donaldson to retain the possession and use of his household furniture and effects or any part or parts thereof for any time or period or to sell and re-assign the same to the said Joseph Donaldson or to any person or persons on behalf of him for a nominal or such other consideration as the said Trustee, his executors, administrators or assigns shall think proper. And also that it shall be lawful for the said Trustee, his executors, administrators or assigns to employ the said Joseph Donaldson or any other person or persons whomsoever, to assist in selling and realising, collecting and getting in the said premises or any part thereof or otherwise carrying out the trusts and provisions of these presents or winding up the joint and separate affairs and concerns of the said Joseph Donaldson and to allow or pay to the said Joseph Donaldson or other, the person or persons who shall be so employed such salary or compensation as the said Trustee his executors, administrators or assigns shall think reasonable. And also that notwithstanding these presents or anything herein contained, any creditor or creditors of the said Joseph Donaldson having any lien or security for his or their debt or to the payment whereof any person or persons, or corporation or corporations is or are, or shall be liable as a joint debtor or joint debtors, or as co-surety or co-sureties with, or as surety or sureties for the said Joseph Donaldson shall and may lawfully concur in and execute these presents without prejudice to such lien or security, or to the claims or remedies over against any joint debtor or joint debtors, co-surety or co-sureties or against any surety or sureties as aforesaid and shall and may treat the same lien or security as and in the

same manner as he or they would be entitled to do in case the said Joseph Donaldson had become insolvent within the colony of Victoria and shall receive a dividend or dividends upon so much of the said debt or demand as shall not be answered or satisfied by with or out of the same lien or security. And also that any creditor or creditors having any such lien or security as aforesaid shall if and when requested by the said Trustee, his executors, administrators or assigns put and fix a value on such lien or security and notify the same in writing to him the said Trustee, his executors, administrators or assigns shall have the right and option and be at liberty either to take over such lien or security at such valuation for the benefit of the creditors executing these presents or allow the creditor or creditors to redeem the same at such valuation in satisfaction or part satisfaction as the case may be, of his or their debt or claim. And also that it shall be lawful for the said Trustee, his executors, administrators or assigns to make any such arrangements with respect to any mortgage, lien, charge or encumbrance upon or affecting any of the said premises as he shall deem proper or expedient. And to commence, continue, prosecute or defend at the expense of the estate any action, suit or proceeding in anywise relating to or concerning the said premises or any part thereof and to compromise or compound for and settle and adjust any debt or debts due or owing or claimed to be due or owing to the said Joseph Donaldson or any claim which may be made or set up against him or his estate or any dispute doubt or difference respecting or concerning the same and to accept part of any debt or debts as aforesaid in satisfaction of the whole or give time for payment of any such debt or debts either with or without having security therefor and to refer to arbitration any matter question or difference whatsoever relating to or affecting the said premises or any part thereof or the said estates or either of them or any claim thereon and to abide by and perform or avoid or set aside any award which shall be made therein as the said trustee his executors administrators or assigns shall think proper or expedient And also to admit any debt or claim upon or against the said estate for such sum and upon such evidence as he or they shall think proper and reasonable although the name of the creditor or claimant may not appear in the said schedule hereunder written or hereunto annexed or the sum or amount appearing in such schedule may differ from the amount claimed And also to require any creditor or creditors whether having executed these presents or not before receiving any dividend under these presents, to make and deliver to the said trustee or his executors administrators or assigns full particulars in writing of the debt claim or demand of such creditor or creditors, and notwithstanding any bill or bills or promissory note or notes may have been given for the same or any part thereof, and also a statutory declaration of proof of debt or claim in like manner and form or to the like effect as nearly as may be as is required in an insolvent estate. Provided also and it is hereby further agreed and declared that the said trustee his heirs executors and administrators shall not be charged or chargeable with or for any moneys goods properties or effects other than what he shall actually receive or which shall come to his hands, nor be answerable or accountable for the acts or defaults of any banker broker auctioneer accountant servant agent clerk or other person who may be so employed in or about the execution of the trusts of these presents, or otherwise for any involuntary losses, and that it shall be lawful for the said trustee or his executors administrators or assigns to pay and discharge out of any moneys which shall come to his hands under or by virtue of these presents all such costs charges and expenses as he may sustain or incur or be put to in or about the execution and performance and carrying out of the trusts and provisions of these presents. And further that the said trustee shall be entitled to transact and charge and shall be paid out of any moneys which shall come to his hands under or by virtue of these presents for all business done by him or his firm of "Blake and Riggall" in relation to the trusts of these presents. Provided further that in case the said trustee or any trustee or trustees to be appointed under this present provision shall die or be desirous of relinquishing the aforesaid trusts or shall become incapable to act therein, then and so often as the same shall happen it

shall be lawful for the major part in number and value of the said creditors who have executed these presents of the said Joseph Donaldson and each of them parties hereto who shall themselves or their agents be present at any meeting of the creditors which may be convened for that purpose, to appoint a new trustee or new trustees (and whether such new trustee or new trustees shall or shall not be a creditor or creditors of the said Joseph Donaldson) in the place or instead of the trustee or trustees so dying desiring to be discharged or resigning or becoming incapable to act as aforesaid, and thereupon the trust estate property and effects then undisposed of shall be vested in such new trustees or trustee alone or jointly with the continuing trustee or trustees as the case may require, and every such new trustee shall have the same powers authorities and rights as if he had been appointed a trustee by these presents. And this Indenture further witnesseth that in consideration of the premises the said several persons parties hereto of the third part do and each of them doth hereby for themselves and himself and their and his respective partners or partner acquit release and for ever discharge the said Joseph Donaldson his heirs executors and administrators and his estate of and from the several debts mentioned in the said schedule hereunder written or hereunto annexed, and all other debts claims and demands whatsoever, and from all actions suits and proceedings in respect thereof, but without prejudice nevertheless to the rights and remedies of the said parties hereto of the third part or any of them respectively in respect of any lien or security which they or any of them respectively may hold for their or his debt or claim, and without prejudice to their or his claims rights and remedies as against any person or persons or corporation or corporations liable as a joint debtor or joint debtors or as co-surety or co-sureties with or as surety or sureties for the said Joseph Donaldson for the said several debts mentioned in the schedule hereunder written or hereunto annexed or any or either of them. Provided always and it is hereby agreed and declared that the aforesaid release shall operate and be of full force and effect as against all the said parties hereto of the third part who shall affix their hands and seals to these presents notwithstanding that any other of the creditors of the said Joseph Donaldson shall not execute the same. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first hereinbefore written.

Signed sealed and delivered by the
said Joseph Donaldson in the pre-
sence of

L. K. S. Mackinnon,
Solicitor,
Melbourne.

Joseph Donaldson (Seal)

THE SCHEDULE.

Names of Creditors.	Amounts.	Signatures	Seals.	Witness.
J. Taylor	3344 7 6		(Seal)	
J. Goodfellow	2660 16 8		(Seal)	
Arnheim	3639 11 8		(Seal)	
Aarons	1725 0 0		(Seal)	
Allen	60 0 0		(Seal)	
B. R. Harris	2510 12 6		(Seal)	
Henriques & Co.	249 11 8		(Seal)	
Peers & Co.	514 11 6		(Seal)	
Mrs. Walsh	74 0 0		(Seal)	
John Donaldson	1323 5 0		(Seal)	
A. A. Donaldson	650 0 0		(Seal)	
Wm. Donaldson	470 0 0		(Seal)	
F. G. T. Nicholas	89 2 6		(Seal)	
A. W. Clarke	425 0 0		(Seal)	
J. J. North	1062 10 0		(Seal)	
B. Rolls	1000 0 0		(Seal)	

within the exception of sec. 132 of the *Instruments Act* 1890. Any creditor may, under this deed, come in and take advantage of it by executing it, and it is therefore for the benefit of all the creditors. *General Furnishing, &c., Co. v. Venn*, 2 H. & C. 153. *Boldero v. London and Westminster Discount Co.*, 5 Ex. D. 47. The recital of the deed expressly declares that it is for the benefit of all creditors.

Mr. Johnson for execution creditor. This deed is void under 13 Eliz. cap. 5. There is no consideration for it, and may delay and defraud creditors. The deed has no force until one creditor at least has signed it. It may be that no creditor may ever sign it, and it contains provisions which would probably prevent reasonable persons from signing, and therefore cannot be for the benefit of all creditors. If it is not for the benefit of all creditors it must be registered as a bill of sale, *Port v. London Chartered Bank*, 1 V.L.R. (L.) 162.

HIS HONOR: In that case there was a provision that the deed had to be signed within a certain time.

Mr. Johnson: The principles enumerated in that case are contrary to the principles approved of in the English cases cited by *Mr. Mitchell*, but they have always been approved of in our Courts. *In re Weidemann*, 5 V.L.R. (1) 32. *In re Derham*, 1 V.L.R. (1) 2. There are also objections to this deed, inasmuch as it allows the debtor to retain possession of his household furniture and effects, and empowers the trustee to employ the debtor at a salary, and to pay himself a commission.

Mr. Mitchell in reply cited *In re Vagg*, 13 V.L.R. 172; *In re Thomas and Cowie*, 9 V.L.R. (1) 2; and *Reg. v. Crease*, L.R., 2 C.C. 105.

HIS HONOR said: I will consider the matter.

HIS HONOR on a subsequent day read the following judgment:

A Sheriff's Interspreader summons.

The only matter in contest between the execution creditor and claimant was the efficacy of a deed of assignment for benefit of creditors under which *Mr. Riggall* claimed the goods of the debtor which had been seized. The deed bore date the 15th of February last, before judgment was signed in the action. It had been executed on that day by the debtor whose execution was admitted, but by no other creditor at any time, and it had not been registered. The goods were seized on the 14th of March, and a written notice of the claim was served on the Sheriff's officer on the following day. On behalf of the execution creditor it was objected that the deed was not for the benefit of all the creditors of the debtor, and ought, therefore, to have been registered as a "bill of sale" under section 133 of the *Instruments Act* 1890, to make it good against the execution creditor, that it was void under the 13th Eliz. c. 5, as intended to delay, hinder, or defraud creditors, and finally that having been executed by nobody but the debtor it never took effect. By the 132nd section of the *Instruments Act* 1890 assignments for the benefit of the creditors of the person making or giving the same are expressly excluded from the term "bills of sale". It has, however, been held that the expression "for the benefit of the credi-

Mr. Mitchell for the claimant. This deed need not be registered as a bill of sale, as it is an assignment for the benefit of all the creditors, and therefore comes

tors" in a section of the English Act, 17 & 18 Vic. c. 36, corresponding with this one means "for the benefit of all the creditors." (*General Furnishing and Upholstering Co., v. Venn* 2 H. & C. 161; *Boldero v. The London and Westminster Dist. Co.*, 5 Ex. D. 47) This deed was impugned as not being for the benefit of all the creditors upon various grounds: first, that the trust for the payment of debts out of the residue, after satisfying the costs, charges and expenses thereby provided for, was for payment only to the creditors who should execute the deed; secondly, that amongst the charges and expenses so provided for were included a fair and reasonable commission or remuneration to the debtor for supervising the realization of his property, if he should be appointed supervisor for that purpose, and a commission of 5 per cent to the trustee for his trouble on the gross amount to be received by him except on any monies then in the Federal Bank to the credit of the debtor; thirdly, that the trustee was empowered if he thought proper to allow the debtor to retain the possession and use of his household furniture and effects or any part thereof for any time, or to sell and reassign the same to him or to any person on his behalf for a nominal consideration or other consideration to be determined by the trustee; fourthly, that the trustee was authorised to employ the debtor or any other person or persons in collecting the assets, carrying out the trusts, or winding-up the estate, and to allow them such salary or compensation as he might think reasonable; fifthly, that the trustee was empowered to admit any debt or claim upon the estate for such sum and upon such evidence as he should think reasonable, although the name of the creditor or claimant might not appear in the schedule of creditors, or the sum appearing in the schedule as due to him might differ from the amount claimed; and to require any creditor before receiving any dividend to deliver to him full particulars of his debt in writing and also a statutory declaration or proof of his debt in like manner and form and to the like effect as nearly as might be as he would be required to do if the estate were insolvent. As to the first of these grounds I have no doubt. Any creditor may take advantage of the deed, who chooses to sign it; and if the trusts were being administered in equity, the Court would compel him to execute before he could come in under it. On the face of the deed, so far as concerns this matter, it appears that it was intended for the benefit of all the creditors, *General Furnishing etc. Coy. v. Venn*; *Boldero v. The London etc. Discount Co., ubi sup.* The 2nd and 4th grounds are of the same character. The clauses to which exception have been taken only provide for a fair remuneration to the persons employed in realizing and distributing the assets. It is not unreasonable that the trustee should receive compensation as well as anyone else who lends his services for that object; or that he should avail himself of the assistance of the debtor who is best acquainted with his own business. The trustee's commission is fixed; and some discretion must be conceded to him as to the salaries to be allowed to his employes. At the first blush his own commission does not seem excessive, and

there is no evidence to show that it would be so. With respect to the other grounds, the 3rd and 5th, I feel some misgiving. It has not been unusual in deeds of this description to permit the debtor to retain possession of his furniture either permanently or temporarily, but I have no idea what the whole estate of the debtor is worth, or what may be the value of his household furniture and effects; and I can therefore form no opinion whether it is fair to the creditors that such a power should be vested in the trustee. The exception really amounts to this, that as it was within the trustee's power to restore his household furniture and effects to the debtor for a nominal sum, the assignment was not an assignment of all the debtor's property. But is it necessary that all the debtor's property should be assigned in order to avoid the necessity of registering the deed as a bill of sale? I think not. The Statute does not say so; but exempts deeds of assignment for the benefit of creditors in general terms. Adverting now to the 5th ground, it was decided by Molesworth J. that a trust to pay scheduled creditors and all others who should by reasonable evidence satisfy the trustees that they were at the date of the deed entitled to have been included as creditors, with power for the trustees to inquire into and insist upon such proof as they might deem reasonable in support of any debt alleged in the schedule to be due, was not a trust for the benefit of all the creditors (*Re Wiedemann*, 5 V.L.R., I.P. & M. 32.) The discretionary authority committed to the trustees of this deed, of admitting creditors for such sum and upon such evidence as they may think proper or reasonable is substantially the same as that in *Wiedemann's case*; which has not been overruled (See *re Thomas and Cowie* 9 V.L.R., I.P., and M., 2; *Davey v. Danby* 13 V.L.R., 957.) There subsection 1 of section 37 of the *Insolvency Statute* 1871 was under consideration, but the point determined was the same. "For the benefit of the creditors generally" means "for the benefit of all the creditors," although it imports also "for their equal benefit" (*re Wood* L.R., 7 Ch. 307.) If this view is correct, this deed can be of no avail as against the execution creditor. (See *re Vagg*, 13 V.L.R., 172.) I do not acquiesce in the objection that this deed is void by virtue of the statute 13 Eliz. c. 5. To avoid a deed under that statute the intention to delay, hinder, or defraud creditors must have been an actual as distinguished from a constructive intent, just as under subsection 2, of section 37 of the *Insolvency Statute* 1871 the intention must exist in fact and cannot be presumed. (*Michael v. Oldfield*, 13 V.L.R., 793; *Davey v. Danby, ubi sup.*; *Boldero v. The London and Westminster Discount Co. ubi sup.*; *Alton v. Harrison* L.R., 4 Ch., 622.) The reason why no creditor executed the deed between the 15th of February and the 14th of March, has not indeed been explained, but I cannot assume that the delay would not admit of explanation, or was a sign of dishonesty in the debtor. Neither the execution creditor nor the claimant proffered any evidence beyond the claimant's affidavit. The deed itself indicates no design of impeding or defrauding creditors. The last objection, which was the least

pressed, seems to me the most formidable. The deed contains a release of debts on the part of the creditors who were expected to execute it, which would have been a valuable consideration. It was not intended to be voluntary, and in my opinion could not operate at all, unless and until it was executed by one at least or more of the creditors, (see *Davy v. Shurmann*, 7 V.L.R. (L) 188). Up to that time, I apprehend, it was merely an escrow. I must order that the claim of the claimant be barred, and that he do pay to the sheriff and execution creditor respectively, their costs of the summonses, which I fix at £2 2s. and £1 1s. respectively. I understood Mr. Johnson to say that the sheriff's fees and charges had not been increased by the claim, and would not be increased by my inability to deliver judgment immediately, as under the *fi fa* he had been and would continue in possession of other goods not included in the claim.

Solicitor for execution creditor, *Smith, Emmerton and Johnson*; for claimant, *Blake and Riggall*.

SITTINGS IN BANCO.

(Before Higinbotham, C.J., Williams and Hood, J.J.)

THE QUEEN v. BUTLER.

March 28th.

Duty—Probate and Administration Act 1890, s. 116. The words "property devised or bequeathed to the widow of a testator" in section 116 of the Probate and Administration Act 1890 clearly relate to property in Victoria, and strictly construed would justify a reduction of the per centage chargeable for duty only in cases where property in Victoria is specifically devised or bequeathed to the widow, but where it can be proved to the satisfaction of the master that a general legacy is necessarily payable either wholly or in part out of the proceeds of property in Victoria the master would be justified in allowing a proportionate reduction.

Where a legacy to a widow is not specific and it appears that there is property outside Victoria from which it might be paid, the burden of proving that the duty payable on the Victorian assets is subject to a reduction in respect of the amount of such legacy lies upon the executor claiming such reduction.

This was a case stated by the Master-in-Equity for the opinion of the Supreme Court, and referred to the Full Court by His Honor Mr. Justice McBeckett. William Martin died in Scotland on the 9th of June, 1890, leaving a will executed on the 5th of December, 1881. By his will the testator amongst other bequests bequeathed to Florence Maud Martin, his wife, a legacy of £20,000. He then devised and bequeathed the whole of his property to his trustees, of whom the defendant in this suit was one, upon trust to get in the same and convert the same into money except such parts as already consisted of money, and out of the moneys to arise therefrom or thereby, together with the ready money of which he should die possessed, to pay his funeral and testamentary expenses, probate duty, debts and pecuniary legacies,

and after the payment of such expenses, duty, debts and legacies, the trustees to stand possessed of the balance upon the trusts following, &c. At the time of his death the testator had real and personal estate in Scotland of the value of about £12,715 10s., and personal estate in England of the value of about £55,342, and personal estate in New Zealand of the value of about £3,574, and personal estate in Queensland of the value of about £775 and personal estate in Victoria of the value of about £39,095 18s. 3d. The debts of the testator at the time of his death amounted to £582 of which amount £475 were owing by the testator in Victoria. The testator left a widow surviving him (who was the wife referred to in the will) but no children. Questions then arose whether for the purpose of assessing the duty payable under the *Administration and Probate Act 1890* the bequest of £20,000 given to the widow of the testator should be distributed over the whole of the estate of the testator wherever situate, and only a proportionate part of the bequest charged with half duty under section 116 of the Act or whether the whole of the said bequest should be charged with half duty only or in what manner the duty should be charged. The Master-in-Equity accordingly reserved the following questions for the opinion of the Court:—

(1.) Whether in assessing duty under the said Act the full amount of £20,000 bequeathed to the widow of the testator should be charged with only one-half of the percentage mentioned in the Seventh Schedule Part I. of the Act, and if not.

(2.) In what manner ought the duty to be calculated as regards the said legacy?

Mr. Higgins and Mr. Bryant for the plaintiff.

The question involved here is this, supposing a man having property in several other countries besides Victoria dies leaving a will under which he directs the whole of his property to be put into one pool and out of that pool directs his trustees to pay a legacy to his widow, is that legacy exempt from one half duty. The last clause of section 116 of the *Administration and Probate Act 1890* applies to this particular case and it is the construction of this clause that the court had to deal with. The defendant contends that this legacy of £20,000 ought to be charged with only half duty because it is a devise to the widow. The view taken by the Master-in-Equity in assessing the duty was that this legacy should be distributed amongst the testator's properties in England and elsewhere, and then that a proportionate part of such legacy should be charged with half duty under section 116 of the Act. There is a third view and that is that none of it is exempt from duty on the higher scale. In *Blackwood v. The Queen* 8 App. Cas. 82 it was decided that the only assets that were liable to duty under the Act were Victorian assets and that the domicile of the testator had nothing to do with the question. That case was followed in *Powder v. The Queen* 12 V.L.R. 50, and *Regina v. Smith* 9 V.L.R. (L.) 404. And there is also a recent case *Commissioner of Stamps v. Hope* 1891, 1 App. Cas. 476.

If the Act only deals with Victorian property then

an exemption from that act only affects Victorian property. In order to exempt £20,000 of the Victorian assets or any part thereof from duty on the higher scale the defendant must show that this legacy or some part thereof has been or must be paid out of the Victorian assets and no such proof has been given.

Dr. Madden and Mr. Irvine.—The object of the Legislature in passing this enactment s. 116 was to protect the widow in all instances. The cases referred to by Mr. Higgins no doubt lay it down that the Act only applies to Victorian property which is obviously correct as a local legislature has no power to legislate about property not within its jurisdiction, but a local legislature has power to legislate concerning the rights of a widow wherever she is and what Parliament has done here is to say that in every case the widow shall be exempt from one-half the duty generally chargeable. [Hood, J.—It is not an exemption it is a mode of calculating the duty in certain cases.] Section 116 provides that duty shall be calculated in a particular way and the person to calculate the duty is the Master, and duty is payable after notice specifying the amount signed by the Master. In the circumstances of the present case he cannot calculate the duty accurately because this legacy may or may not be payable out of the Victorian assets; therefore he is in the position of a plaintiff in an action who can only claim for so much as he can prove and accordingly in the uncertainty of the present case the Master can only recover for one-half the amount of duty on the amount of this legacy.

Mr. Bryant.—The onus of proving that the Victorian assets to the amount of this legacy are chargeable with one-half duty only lies upon the executors and they have failed to establish that proof therefore the Crown is entitled to charge duty on the whole of the Victorian assets on the higher scale.

Cur. ad. vult.

April 29th.

HIGINBOTHAM C. J.—The questions stated in this case arise upon the following words of the 116th section of the *Administration and Probate Act 1890* :—

“When other persons (that is to say besides the widow) are entitled under such will, the duty shall be calculated so as to charge only one-half of the percentage mentioned in the seventh schedule upon the property devised or bequeathed to the widow of a testator.”

It was contended for the defendant—one of the executors named in the will to whom probate was granted in Victoria—that, as the testator at the time of his death had real and personal estate in the country of domicile, and in other countries as well as in Victoria, the bequest of £20,000 to the widow should, in the absence of specific words confining her right to exemption or deduction to property in Victoria, be distributed over the whole of the estate of the testator wherever situated. We do not concur in this view. It was decided in *Blackwood v. The Queen*, L.R., 8 App. Cas., 82, that the Victorian assets only of a testator are liable to duty under the Act. The executor is not required and cannot be compelled to file a statement specifying the particulars of the personal and real estate of the testator in other countries, and duty has to be paid on the value calculated upon the final balance

of the real and personal estate in Victoria at the time of the testator's death as determined by the master. When an executor applies for probate in Victoria the duty mentioned in the seventh schedule is *prima facie* chargeable on the value so determined of the estate in Victoria. The words in the 116th section, “property devised or bequeathed to the widow of a testator,” clearly relate to property in Victoria, and strictly construed they would justify a reduction of the percentage only in cases where property in Victoria was specifically devised or bequeathed to the widow. But where it can be proved to the satisfaction of the master that a general legacy was necessarily payable, wholly or in part, out of the proceeds of property in Victoria the master would be justified in allowing a proportionate reduction. In the present case, as the legacy is not specific, and as it appears that there is property outside Victoria from which it might be paid, the burden of proof undoubtedly lies on the executor claiming the reduction, and no proof has been afforded by the executor that the whole or any part of the legacy must be paid out of the property of the testator in Victoria. Our answer to the first question submitted for the opinion of the Court is “No.” Our answer to the second question is that the duty as regards the legacy ought to be calculated on the higher scale.

Solicitors for the Crown, *Gunnness*.

Solicitors for the executor, *Farmer and Roberts*.

(Before Higinbotham C.J., Williams and Hood J.J.)

HENDERSON V. HORNE.

April 13th.

Promissory notice—Due notice of dishonour—*Instrument Act 1890*, s. 50, sub-secs. 12 & 13.

An endorsee and holder of a promissory note sued the endorser of the note, and the defence set up was no sufficient notice of dishonour. It was proved that the plaintiff's agent in whose hands the note was for collection did not give the plaintiff due notice of the dishonour in accordance with section 50, sub-sec. 13 of the *Instruments Act 1890*. It was also proved that though the plaintiff did not receive due notice of the dishonour from his agent yet he received notice in time to enable him to give due notice of the dishonour to the defendant within the provisions of the above sub-section.

Held that the defendant had due notice of the dishonour of the promissory note.

This was an appeal from the judgment of Hodges J., nonsuiting the plaintiff. The action was brought by Thomas Henderson the endorsee and holder of a promissory note for £140 against Harriet Horne the endorser of the note. The defence was no due notice of dishonour. The plaintiff was nonsuited. The remaining facts appear in the judgment.

Mr. Irvine for the plaintiff appellant. The question for the Court is whether notice was given within a reasonable time. The bill which was in the hands of the City of Melbourne Bank for collection, was presented at the Bank of Victoria, Harrow, on the 24th

December and dishonored, but notice of such dishonor was not sent to the plaintiff by his agent until the 29th. Plaintiff received the notice on that day, and on the same day forwarded notice to the defendant. The 25th and 26th of December the days following the dishonor of the note were bank holidays by virtue of the *Banks and Currency Act*, but the notice to the plaintiff by his agent should have been sent on Saturday to be within the time provided by the *Instruments Act* s. 50, sub-sec. 13. But even supposing that the plaintiff had received notice from his agent on the Saturday of the dishonor, he would under the above mentioned sub-section of the *Instruments Act* have had till Monday to send off notice to the defendant, and as a matter of fact he did send off notice by letter to the defendant on the Monday and therefore I submit that as the defendant as between himself and the plaintiff was given due notice of the dishonor he cannot complain of a breach of duty by the plaintiff's agent which is a matter merely between the plaintiff and his agent.

Mr. MacHugh for the defendant respondent. There is nothing in the learned judge's notes of the evidence to show that the plaintiff and defendant resided in different places, and where the parties reside in the same place, section 50 of the *Instruments Act* contemplates notice being given on the day on which the bill is dishonored. On the question of costs if the court should be against the respondent, I submit that the costs of this appeal should not be allowed as the provisions of the *Banks and Currency Act* 1890 were not called to the attention of the learned judge at the trial.

Mr. Irvine, There is ample evidence that the parties did not reside in the same place. With reference to there having been no mention made of the *Banks and Currency Act* at the trial, it was raised on the pleadings and that being so was in issue before the Court.

Cur. ad. vult.

April 29th.

HIGINBOTHAM, C.J.,—Appeal from judgment of nonsuit by HODGES, J.—The action was brought by the plaintiff, the holder of a promissory note, against the defendant, an endorser, who pleaded that she had not due notice of dishonor. The note, which was payable at the Bank of Victoria, Harrow was in the hands of the City of Melbourne Bank for collection. It was presented for payment and dishonored on Wednesday, December 24. Assuming, as it appears to have been assumed at the hearing, that the plaintiff and his agent—the City of Melbourne Bank—resided in the same place, Melbourne, notice of dishonor would be given within a reasonable time by the bank if the bank gave notice to the plaintiff, or sent off notice in time to reach the plaintiff, on the day after the dishonor; and the plaintiff upon the receipt of the notice would have the same time for giving notice to the defendant if he and the defendant resided in the same place, or in case they resided in different places, if the plaintiff sent off notice duly addressed and posted to the defendant on the day after the plaintiff received the notice. *Instruments Act* 1890 sec. 50 (12 and 13). Christmas Day, Thurs-

day, 25 December, and the following day, Friday, 26th December, are appointed bank holidays by the *Banks and Currency Act* 1890, sec. 17. Due notice therefore as between agent and principal would be sent by the bank to the plaintiff, if the bank sent off notice in time to reach the plaintiff on Saturday, 27th December; and due notice as between the plaintiff and defendant would be given to the defendant if the plaintiff sent off notice to defendant, residing in a different place, on the following Monday, 29th December. The plaintiff in fact received notice from the bank through his solicitor on that day, Monday and there was evidence that on the same day the plaintiff's solicitors sent off notice duly addressed and posted to the defendant at Glenvale, Harrow, and consequently that the defendant had due notice of the dishonor of the promissory note. The judge, therefore, was in error in non-suiting the plaintiff. The appeal will be allowed, but without costs, as the judge's attention was not called to the provisions of the *Banks and Currency Act* 1890. The case will be heard, and the costs of the first hearing will abide the event of the rehearing.

Solicitor for the plaintiff appellant, *Gardiner*.

Solicitor for the defendant respondent, *MacDermott*.

(Before Higinbotham, C.J., Williams & Holroyd JJ.)

KING v. THE VICTORIAN RAILWAYS COMMISSIONERS.

Feb. 25th & 26th.

Negligence—Contributory negligence.

A passenger travelling by rail put his head out of the window. An approaching train coming from the opposite direction had one of its carriage doors wide open. This door struck the passenger and killed him. In an action by the administrator of the deceased against the Railways Commissioners for negligently causing the death of the deceased, the defence to which was a denial of negligence and an allegation of contributory negligence, the jury found a verdict for the plaintiff for £200 damages, and judgment for that amount was entered up for the plaintiff.

Held on appeal and motion for new trial (per Higinbotham, C.J., and Holroyd, J.) that the fact of the door of the passing train being open was evidence of negligence on the part of defendants, and that the act of the deceased in putting his head out of the window though a voluntary act was not an unlawful act, nor was it obviously a dangerous act, and that therefore it could not be affirmed that the evidence went necessarily to show that the negligence of the deceased was the cause of his death, or that the deceased had been guilty of any negligence at all, and that therefore the question of contributory negligence could not have been properly withdrawn from the consideration of the jury and a verdict directed for the defendants, and the appeal was dismissed and the motion for new trial refused.

(*Per Williams, J., dissentiente*). Assuming that there was evidence of negligence on the part of the defendants in respect to the open door of the passing train, yet if a passenger chooses to do an act outside the car-

riage, which may be dangerous, he does that act at his own risk unless he has been induced or invited to or is excused from doing that act by reason of some inducement, conduct or default of the defendants.

This was an appeal from the judgment of A'BECKETT, J., and also a motion for a new trial. The action was brought by the plaintiff, the father and administrator of Charles Franklin King, deceased, against the defendants for negligently causing the death of the deceased while travelling on their railway. The defendants denied negligence on their part and alleged contributory negligence on the part of the deceased. On the night of July the 1st, 1890, the deceased was travelling on the defendants' line of railway from Melbourne to Essendon. After leaving North Melbourne the deceased put his head out of the window of the carriage in which he was travelling, and was struck and killed by the open door of a carriage of a train passing in the opposite direction from Essendon to Melbourne. The distance between the two lines on which the trains were running was six feet, and the distance between the edge of the open door of the one carriage and the side of the other was according to the plaintiff's evidence 7½ inches, or according to the defendant's evidence 11½ inches. The reason which induced the deceased to put his head out of the window was unknown, and the extent to which he leaned out varied according to different witnesses. The action was tried before A'BECKETT, J., and a jury of six. At the conclusion of the plaintiff's case the defendants moved that the jury should be directed to return a verdict for them, on the grounds that there was no evidence of negligence on their part, and that the accident was wholly brought about by the deceased's own negligence in putting his head out of the window. His Honor, however, sent the case to the jury, who in answer to specific questions found, first, that the deceased was not acting negligently in putting his head out of the carriage window in the way he did; and, secondly, that the door which struck the deceased was left open by the negligence of the defendants' servants, and they returned a verdict for the plaintiff for £200, apportioning one half to the father, and the other half to the mother of the deceased, and judgment was entered up accordingly. From this judgment, the defendants appealed on the grounds—first—that the mere fact of the door of the passing train being open was not evidence of negligence on the part of the defendants, and that no other evidence of negligence was given—and secondly—assuming that the carriage door was open through the negligence of the defendants, the accident was brought about, not by reason of such door being open, but by reason of the voluntary act of the deceased himself, in putting his head out of the window. The defendants also moved for a new trial on the grounds—first—the same ground as the second ground of appeal—secondly—that the learned judge misdirected the jury in telling them that it was a question for them to consider whether the act of the deceased was one of ordinary precaution and prudence, or one done at his own peril involving in itself a risk—thirdly—that the learned judge should have directed

the jury that the deceased in putting his head out of the carriage did so at his own risk—and fourthly—that the findings of the jury were against evidence, and the weight of evidence.

Mr. Bryant and Mr. Hayes, for the defendant appellants.

Dr. Madden and Mr. Box, for the plaintiff respondent.

Cur. ad. vult.

June 2nd.

WILLIAMS, J., *dissentiente*. The facts of this case are very simple so far as they are material to the point upon which I base my judgment. The deceased was a passenger in the defendants' train from Melbourne to Essendon; he was travelling by night. After the train had left North Melbourne he rose from his seat, and for some purpose unexplained put his head out of the window, according to the plaintiff's version a distance of 7½ inches, according to the defendants' version 11½ inches. While the deceased was in this position, and the train was speeding towards the next station, another train of the defendants passed on another line of rails. Between the two sets of rails there was a way of six feet clear. A door of one of the carriages of the passing train on the side next to the train in which the deceased was a passenger was open, and this open door struck the deceased on the head and killed him. It was admitted both at the trial and during the argument before us that this open door in no way interfered with the passage of the train in which the deceased was a passenger, and that the deceased could have suffered no injury from this open door had his head not been projected out of the window. It was evidently suggested at the trial that the deceased had put his head out of the window to vomit, but if this be material, not only is it unsupported by evidence, but what evidence there is negatives the hypothesis. I refer to the evidence of Horner for the plaintiff and of Boswell for the defendants, the only two passengers in the carriage who were called to give evidence, and there is no evidence that any trace of vomiting was found upon the footboard or upon any part of the carriage. We have, therefore, the simple facts—(1) that the deceased rose from his seat when the train was in motion, and voluntarily, and for no assigned purpose, projected his head out of the window to a substantial extent; (2) that while he was in this position the open door of a passing train struck his head and killed him; and (3) that that door, when opened to its widest extent, in no way interfered with the clear passage of the train in which the deceased was a passenger. Upon these facts, as to which there is substantially no dispute, the question arises, and arises, I believe, for the first time in English courts, whether the plaintiff can, as the representative of the deceased, maintain an action against the carriers. For the purpose of considering this question I assume that there was evidence of negligence on the part of the defendants in respect to the open door of the passing train. Assuming this, the proposition that I have to consider appears to me to be this—Was the injury to the deceased caused by the neglect of any duty which

the defendants owed to the deceased? What was the duty owed to the deceased by the defendants? To convey him in a carriage of the train by which he was a passenger from Melbourne to Essendon with all reasonable despatch, care, and caution; to provide him with a seat in a reasonably safe and secure carriage, to manage the train in a reasonably safe and proper manner, and to use all reasonable means to keep a fairway for the passage of that train; and if by any neglect of that duty the deceased had met his death, his representative would undoubtedly be entitled to hold the defendants responsible for the consequences. But I am unable to discover any duty on the part of the defendants to take precautions for the safety of a passenger, who voluntarily projects part of himself outside the carriage in which the defendants have contracted to carry him, against dangers which may befall him by reason of such projection, dangers perfectly innocuous to the train and to the passengers in that train as long as they keep themselves within the train. I use the word "voluntarily" advisedly, for, if the passenger is by any act, conduct, or default of the defendants induced or invited to thus project or excused from thus projecting himself, then a duty arises on the part of the defendants to take reasonable precautions to protect him against danger; as, for instance, if a passenger has occasion to communicate with the guard by means of communication placed outside the window—if while he is reasonably engaged in this act he were to be struck by the open door, negligently so left, of a carriage of another of the defendants' trains which happened to be passing at the time, the defendants in such a case would be responsible; so, if a collision between two trains of the defendants were imminent through faulty management on the part of the defendants, and a passenger, in order to escape from the consequences of the impending crash, were to leap out through the window, and in so doing injure himself, he would be entitled to recover, because by the default of the carrier he would be held to be excused. I do not dispute the right of a passenger to rise from his seat and lean out of the window if he likes to do so; all I say is, that if he chooses to do an act outside the carriage which may be dangerous, he does that act at his own risk, unless he has been induced or invited to or is excused from doing that act by reason of some inducement, invitation, conduct, or default of the defendants. Subject to this qualification there is no duty arising out of the passenger's contract cast on the defendants to take precautions for his safety while he is in that position. If this be so, the plaintiff has failed to establish in this case that the deceased met his death by reason of the neglect of any duty which the defendants owed to the deceased, and the undisputed facts do establish that the deceased voluntarily and for no explained purpose exposed himself to a danger for the calamitous consequences of which he cannot legally hold the defendants responsible. The most forcible portion of the argument addressed to us for the plaintiff is to my mind this, that it was part of the defendants' contract with the deceased that he was to be at liberty to make any reasonable use that he

pleased of the carriage in which his ticket qualified him to travel, that the defendants are obliged to take reasonable measures for his safety while making such reasonable use, and that whether his use of it in projecting part of his body out of the window was reasonable or not is a question for a jury. I might perhaps subscribe to the proposition that a passenger is at liberty to reasonably use the carriage in which the defendants have agreed to carry him without relieving them from responsibility—such an user may be an implied term of the contract—but in my opinion that doctrine cannot be extended to an act done outside the carriage, or to an act done partly inside and partly outside. Testing the proposition put forward for the plaintiff by an extreme case, if a passenger were to project himself out of the window to such an extent as to leave only his feet inside, it would be a question for a jury whether that was a reasonable use of the carriage or not, and if a jury could be found to say that it was, the defendants might be held legally liable. Less forcible was the contention that the defendants are to blame for the accident, because they had not placed bars across apertures made for the admission of light and air, so as to prevent passengers putting their heads or bodies out of the windows. I know of no obligation upon them to do an act which might, in moments of great peril, obstruct under certain circumstances the only available means of escape. Nor can I attach weight to the suggestion that the defendants are liable because they had not placed notices in the carriages warning passengers that it was dangerous to project their bodies or heads out of the windows. There might be special circumstances which might cast upon a railway company the burden of giving such a notice, but no such circumstances are proved to have existed in the present case, and I do not know that the law has yet thrown upon railway companies the duty of dry-nursing the travelling public. If the defendants can be held liable for this accident, so could they be held liable if a passenger in a train proceeding through a tunnel which was being repaired were to lean out of the window to ascertain if he could see the other end of the tunnel, and whilst thus gratifying his curiosity were to be struck by scaffolding, which in no way imperilled the fair passage of the train, I think that this appeal should be allowed with costs, and that judgment should be entered for the defendants. I desire, however, to add that the point raised in this case appears never to have been decided in any English court; it has been frequently the subject of decision in American courts, and the weight of those decisions appears to be in favour of the conclusion at which I have arrived, though the reasoning upon which those decisions are based is apparently not upon the line which I have proceeded. I have not overlooked the case of *Gee v. Metropolitan Railway Company*, but the decision in that case was upon a state of facts altogether different from the facts in the case I am now considering. A reference to the facts, as stated by Martin, B., at p. 172 of the report, establishes the accuracy of this observation. Martin, B., there observes—

"In this particular case, what occurred was this. The man was sitting in the carriage; he meant to look out of the window to see if certain lights were visible, but before he did anything of this sort, by merely putting his hand on the bar, the door flew open, and the man met with the accident. It might have occurred if he had intended merely to shift his seat if he had accidentally put his hand upon the bar."

The only comment that I think it is necessary to make upon that case is this—that in that case the defendants were clearly guilty of a breach of duty to their passenger, namely, of the duty to have and maintain the carriage in which he travelled in a reasonably safe and secure condition, and that it was by reason of their negligent non-observance of that duty that the plaintiff sustained injury. I regret that I differ from the views of my two learned brethren in the Court of Appeal, and from those also of the learned primary judge; the fact that their views are opposed to mine much diminishes the confidence that I otherwise would feel in the soundness of my judgment.

HIGINBOTHAM C.J.—This action was brought by the plaintiff, the father and administrator of the estate of Charles Franklin King, deceased, for the benefit of himself, as the father, and of the mother of the deceased, against the Victorian Railways Commissioners for negligent management of a train of the defendants travelling from Essendon to Melbourne, and for not securely locking and fastening the doors of the first-class carriages of that train, whereby the deceased, who was then a passenger in a train of the defendants from Melbourne to Essendon, was struck by the open door of one of the carriages of the first-mentioned train, and killed. The defendants denied the alleged negligence on their part, and alleged contributory negligence on the part of the deceased. The jury returned two special findings; first, that the deceased was not acting negligently in putting his head out of the carriage window in the way he did, and second, that the door which struck the deceased was left open by the negligence of the defendants' servants, and they found a verdict for the plaintiff for £200, apportioning one half to the father and the other half to the mother of the deceased. The judge ordered judgment to be entered in accordance with the verdict. We have now to deal with an appeal by the defendants from that judgment and also with a motion by the defendants for a new trial. The deceased was a Custom-house clerk to a firm in Melbourne. He was often detained at business after office hours. On the night in question, July 1, 1890, he was returning from business to his father's house at Essendon by the 11.20 p.m. train. After leaving the North Melbourne station he put his head out of the centre window of the carriage, described as a first-class double bogie carriage, when he was struck and instantly killed by the open door a similar carriage of a train passing in the opposite direction from Essendon to Melbourne. The distance between the edge of the open door of one of these carriages and the surface of the closed door of the other carriage was $7\frac{1}{2}$ inches according to the plaintiff's evidence, or $11\frac{1}{2}$ inches according to the defendants' witnesses. There was a clear space of 6ft. between the two sets of rails on which the two trains were run-

ning. The reason which induced the deceased to put his head out of the window is unknown, and can only be the subject of more or less probable inference from the facts. The deceased had had influenza in the previous April, and before and after that date he suffered from dyspepsia and difficulty in retaining food on his stomach, an affection likely to be aggravated by influenza. A fellow-passenger in the same carriage observed that he looked weary, and sat with his head in his hand. This witness's memory varied as to the extent to which the deceased leaned out of the window. Another fellow-passenger who sat opposite to the deceased stated that he got as much of his body out as he could, and that he, the witness thinking the deceased might overbalance himself, caught at his coat to prevent him. It was suggested on this evidence that the deceased was compelled to put his head out of the window to vomit. The first ground on which the defendants claim that the judgment should be reversed is that the mere fact of the door of the Essendon carriage being open is no evidence of negligence on the part of the defendants, and that no other evidence of negligence was given. I think that the fact that the door was open at the time and place of the accident was reasonably sufficient evidence to launch the plaintiff's case against the defendants, and that this question could not have been withdrawn from the jury. Carriers of passengers for hire are bound to see that everything under their own control is in full and complete and proper order. This door was under the control of the defendants' servants, and it is not consistent with the reasonable care which the defendants were bound to take, or with the ordinary and usual course of things in the management of trains, that the doors of carriages should be open while the train is in motion.

"There must be reasonable evidence of negligence," Chief Justice Erle observed in *Scott v. London Dock Company* (3 Hur. and Col., 601); "but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

It was contended for the defendants as a second ground of appeal that, assuming that the carriage door was open through the negligence of the defendants, the accident was not due to that cause, but to the voluntary act of the deceased himself in putting his head out of the window, and that the judge upon this ground should have directed the jury to find for the defendants. In support of this view some American decisions were cited, in which it was held that where-ever it was admitted or proved that the injury complained of was inflicted upon a passenger's arm or any other part of his body protruded, by the passenger's voluntary act, beyond the limits of the carriage such protrusion constituted negligence *in se*, and it would be the duty of the Court to declare the act negligence in law. No English authority was cited in support of this view. Stated as it is as a proposition of law, I must express my entire dissent from it. Cases are easily con-

ceivable in which a passenger would be compelled by an imminent danger arising within the carriage itself from some negligence on the part of the carrier, to put his head out of the window to call for help, or in the attempt to escape. In such a case the carrier, and not the passenger, would undoubtedly be liable for the consequences of the passenger's act.

"I quite agree," said Montague Smith, J., in *Adams v. Lancashire and Yorkshire Railway Company*, 1 R. 4 C.P., at page 742, "that, if the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence."

If in any conceivable case such an act of the passenger would not be conclusive evidence of contributory negligence, it cannot be true as a proposition of law that the act constitutes negligence *in se*, and is an answer to the plaintiff's action. It was further argued for the defendants that, assuming such act of the deceased not to be negligence *in se*, it was in this case a voluntary and also an improper act of the deceased, not necessitated by any negligence or default of the defendants, and that consequently the accident was not the result of the defendants' negligence, but of the negligence of the deceased. This same argument was urged without effect in the case of *Gee v. Metropolitan Railway Company*, L.R. 8 Q.B. 161. There a passenger on a London under-ground railway got up from his seat and put his hand on a bar, which was placed across the window of the carriage, with the intention of putting his head out sufficiently to see the lights of the next station. The pressure caused the door of the carriage to fly open, and the plaintiff fell out and was injured. The bar indicated that it might be dangerous to put one's head out of the window. It was contended that the duty of the company was to carry a passenger safely so long as he sits quietly in the carriage, and if an accident happened from any act of his, inconsistent with the ordinary behaviour of passengers, the passenger had only himself to thank, and the company were not liable. But it was held in the Exchequer Chamber, affirming the decision of the Queen's Bench, that there was evidence for the jury that the plaintiff's injury was the result of the defendants' negligence in not securely fastening the door, and that the verdict for the plaintiff ought to stand. COCKBURN, J., distinguishing *Adams v. Lancashire and Yorkshire Railway Company*, L.R., 4 C.P. 739, said at page 165:—

"I quite agree that the passenger must not do anything inconsistent with what passengers ordinarily do on a journey."

Here, assuming that the company had done their duty, the passenger did nothing more than that which came within the scope of his enjoyment while travelling, without committing any imprudence; in passing through a beautiful country he certainly is at liberty to stand up and look at the view, not in a negligent, but in the ordinary manner of people travelling for pleasure. Here the defendant was simply looking at the signal lights, and there was nothing in his conduct which can be imputed to him as negligence or imprudence."

BLACKBURN, J., in the same case, observes at page 166:—

"Was the plaintiff conducting himself in such a way as amounted to a want of ordinary care? As to that, I

can only say it was a question for the jury, and they were right in the verdict that they have found. Looking out of the window, though not a necessary act on the part of the passenger, was not an improper act. In *Adams v. Lancashire and Yorkshire Railway Co.* L.R. 4 C.P., 739, the passenger voluntarily incurred a known and ascertained danger. That case is decided on a different principle, for here there was no known or ascertained danger. The essence of this case is that the plaintiff, trusting that the company had done their duty, stood up looked out of the window, and, by reason of the door being unfastened, fell out and was injured. The argument for the defendants on the point now under consideration attempts to apply the maxim *volenti non fit injuria* to the facts of this case. In my opinion, the maxim is inapplicable to them. This maxim is not, as Bowen, L.J., observed in *Thomas v. Quartermaine*, 13, Q.B.D., 685

"*Scienti non fit injuria*," but "*Volenti non fit injuria*," and only applies to cases "where the danger is visible and the risk appreciated, and where the injured person knowing and appreciating both the risk and danger, voluntarily encounters them."

But in the case now before us, as well as in the case of *Gee v. Metropolitan Railway Company*, L.R., 8 Q.B., 161, there was no danger visible, and the injured person did not and could not know or appreciate either risk or danger as connected with his voluntary act. The maxim was held to apply to the facts in *Adams v. Lancashire and Yorkshire Railway Company*, L.R., 4 C.P. 739, where the injured person undoubtedly knew that the carriage door was open, and it was ruled that he must be taken to have voluntarily incurred the known and appreciated danger and risk of rising from his seat and attempting to shut the door. A different rule from that contained in this maxim applies to cases like the present, where the contributory negligence of the injured person is relied on as an answer to a proven charge of negligence against a defendant. The subject of negligence and of contributory negligence, and of the burden of proof on the plaintiff and on the defendant respectively, in an action for negligence was dealt with in a considered judgment of this Court in the case of *M'Kinnon v. Morris*, 11 V.L.R., 179-81. I adhere to, and adopt as part of my judgment in the present case the opinions there expressed by the Court. Negligence on the part of a defendant, and contributory negligence on the part of an injured person, are questions of fact and not of law, and a plaintiff's claim in an action for negligence cannot be withdrawn from the jury unless—First, no evidence proper to be submitted to the jury of negligence of the defendant materially contributing to the injury (see *per Lord Watson and Lord Blackburn in Wakelin v. London and South Western Railway Company*, 12 App. Cas. 48) has been offered by the plaintiff; or, secondly, no such evidence has been given either by the plaintiff or by the defendant (on whom the burden of proving affirmatively that there was contributory negligence rests in the first instance—see same case at page 47), except what necessarily goes to show that the negligence of the injured person himself has been the efficient cause of his injury. The fact that the proximate cause of the injury was the voluntary act of the injured person himself is not conclusive of contributory negligence, and does not justify a withdrawal

of the case from the jury. To justify the judge in taking that course it should appear, beyond reasonable doubt on the undisputed facts of the case, that the injury naturally springing from the negligent act or default of the defendant would not have occurred but for a voluntary act or default on the part of the injured person, either unlawful in itself or indicating a want of the care and caution which might, under all the circumstances, and having regard to the age and physical health and strength, and the condition of the faculties of the injured person at the time, be reasonably expected from him. *McKinnon v. Morris*, 11 V.L.R., at page 180. Applying this rule to the facts of the present case, I do not think that the judge could have withdrawn the question of contributory negligence from the jury. The act of the deceased in putting his head out of the window, though a voluntary act, was not an unlawful act, neither was it an obviously dangerous act. It would not have been dangerous at all but for the negligence of the defendants, of which the deceased was entirely ignorant. It is improbable, under the circumstances, that it was even an act of mere heedlessness or incaution. It is far more probable that it was an act necessitated and justified by sudden illness. It could not be affirmed, I think, that the evidence went necessarily to show that negligence of the deceased was the cause of his death, or that the deceased had been guilty of any negligence at all, and the judge was right, therefore, in my opinion, in sending the case to the jury. The motion for a new trial rests on four grounds. The first ground is the same as the second ground taken on the appeal against the judgment. The second ground charges it as a misdirection that the learned judge directed the jury that it was a question for them to decide whether the deceased, in protruding part of his body from the carriage, was acting with ordinary prudence and caution, or whether it was an act which should be considered as an act done at his own peril, a negligent act, an act involving in itself a risk which he might suppose he would run. The third ground alleged that the judge should have directed the jury that the deceased in protruding his head and part of his body out of the carriage did so at his own risk. I am of opinion, for the reasons I have stated, that the judge's directions were substantially correct. The fourth ground of the motion is that the findings of the jury were against evidence and the weight of evidence. There was evidence, in my opinion, on which the jury could, as reasonable men, find that the deceased was not acting negligently in putting his head out of the carriage window in the way he did, and that the door which struck him was left open by the negligence of the defendant's servants. No evidence was given by the defendants as to when or how the door became open. There is no doubt that it was open when the two trains met, and that fact unexplained was sufficient to justify the second finding. The jury were at liberty to conclude that the door had not been completely fastened at the Essendon station, or that owing to the imperfection of the lock, it had been shaken open by the motion of the carriage. In

my opinion the defendants' appeal against the judgment should be dismissed and the motion for a new trial should be refused, with costs in each case.

HOLROYD, J.—The Railways Commissioners are common carriers, and their contract with a passenger travelling by any of their railways is to carry him safely and securely thereon. To that obligation there is not, in my opinion, any such condition attached by law as that the passenger shall keep the whole of his body within the carriage. Railways, as well in England as in this colony, have usually been so laid as to allow ample room between any two sets of rails, or between carriages travelling on the line and posts, bridges, or other erections on the side of the road. The class of carriage in which a passenger is to travel is determined ordinarily by the ticket which he takes. Carriages of different classes differ in construction, and carriages of the same class are variously constructed at different times and places. Third-class carriages were once not much better than open trucks. Some first-class carriages are built with a platform at one end, on to which the passenger can walk, and where he can stand protected by a single rail, which, when the carriage oscillates, he is frequently compelled to grasp tightly to prevent himself from falling. Our Victorian first-class carriages are generally so constructed that passengers can put their heads or lean their bodies out of the window, or sit with their elbows protruding, and there is nothing about them to indicate that those who do so will incur any danger. From the fact that a vehicle is roofed over, one is not forced to presume a condition that a passenger shall in case of accident forfeit the benefit of the contract to carry him safely unless he keeps his whole body beneath the roof. A hard and fast rule turning a railway carriage into a prison van seems to me contrary to common sense, and I should not therefore imply it without distinct authority. An act which may be very prudent on one occasion may be extremely incautious on another. Under certain circumstances it may be rash to stand up when the train is in motion, very rash to lean with your back against the door; but it is no part of the contract that passengers shall sit down until the train stops, although seats are provided for them. Circumstances may arise, too, in which it may be not only discreet but even a duty for a passenger to put his head out of window. If he feels sick is he to pollute the carriage and his neighbours for fear of breaking his agreement? The carrier's responsibility is always limited. He is answerable only for the negligence of himself and his servants. If the passenger's own negligence is the efficient cause of an accident the carrier is not responsible. But in discussing a question of negligence every variety of situation and circumstances may have to be considered. I think that the jury in this case were rightly directed by the learned judge. If there had been anything in the construction of the carriage to suggest that it would have been dangerous to lean out of the window, if any notice had been posted warning people against the risk, if any by-law had been made on the subject—these things, of none of which was any evidence given in the present case, might have been,

and should have been, considered by the jury in arriving at their verdict. I have felt some doubt whether the verdict could be sustained, but, upon the whole, I think there was evidence proper to be submitted to the jury. I concur, therefore, with the Chief Justice that the appeal should be dismissed and the motion for a new trial refused with costs.

Solicitor for the defendant appellants, *Guinness*.

Solicitors for the plaintiff respondent, *Gillott, Croker Snowden and Co.*

PROBATE JURISDICTION.

(Before a'Beckett J.)

IN THE ESTATE OF CATHERINE LEAHY.

9, 16 June.

Practice administration—Act No. 978 ss. 10, 11.—Appointment of Company in place of administrator—Form of order—Costs.

Motion under sections 10 and 11 of Act No. 978, for the consent of the Court to the appointment of the Equity Trustees, Executors and Agency Company, Limited, in place of John Anderson the administrator of the estate of Catherine Leahy, deceased.

Administration was granted to Anderson on September 17th 1891.

Mr. Cole for the motion.

Cur. adv. vult.

A'BECKETT J.—In these cases it has been the practice to direct accounts to be taken, and in some cases one order has been made that the administrator shall pass his accounts and that then the consent of the Court to the appointment shall be given. That in a recent case has been found to be rather an undesirable form of order. Facts have been disclosed which would have inclined the Court to refuse its consent to the appointment. I shall follow the order made in *In re Sweeney* 15 V.L.R. 570, and I shall not determine as to costs until the result of taking accounts is certified. The order I now make is—Refer to chief clerk to take accounts of administrator and to certify results as to any balance due to or from administrator, and to report if any special circumstances appear on taking such accounts which should be considered by the Court in dealing with the application to substitute the Equity Trustees Executors and Agency Company. Reserve further consideration of application and costs thereof until after such certificate and report.

Proctor, *Morgan*.

IN THE SUPREME COURT OF TASMANIA.

IN CHAMBERS.

Before the Chief Justice.

IN RE BRODRIBB.

May 30th 1892.

In re Jane Brodribb, deceased, intestate, and the Deceased Persons Estates Act 38 Vic. No. 1 and the Amendment Act 49 Vic. No. 20.

Mr. McIntyre for petitioner.

Solicitor-General for Curator of Intestate Estates.

Mr. McIntyre :—The deceased, Jane Parsley Brodribb, was married to the petitioner, William Brodribb at Bristol, England, in 1836 or 1837. There were 11 children issue of the marriage, and the deceased died intestate on March 2, 1892. She was possessed of certain personal estate, and the Curator of Intestate Estates was authorised by the Court to collect and dispose of it. This had been done, and a balance of £450, or thereabouts, remained in the hands of the Curator. In respect to this sum the petitioner, as husband of the deceased, prayed for an order calling upon the Curator to pay the whole of it, less necessary charges, to him. The Curator had raised the point whether under the *Deceased Persons Estates Act*, 1885 (amending the *Deceased Persons Estates Act*, 1874), personal property should not be divided in the same way as real property, as directed by section 2 of the Act of 1885 (49 Vict., No. 20). This section provided for distribution of real estate of a married woman deceased intestate as follows :—"Upon the death of any married woman intestate, any land to which she may have been entitled in fee simple or for any estate enduring beyond her life, shall go to and vest in her legal personal representative, and be disposable in like manner as other personal assets; and subject to the payment of her debts and liabilities (if any), the proceeds of the sale of such land shall go and be divisible as follows :—One-third to her husband, if he survive his wife, and two-thirds to and equally among her children (the issue of deceased children taking *per stirpes*). If there are no children, and no issue of any deceased child, such proceeds shall go and be divisible as follows :—One half to the surviving husband, and the other half equally to and among the next of kin of such intestate married woman, *per capita*. The proceeds of the sale of the chattels real of an intestate married woman shall be distributed in like manner as is herein provided with reference to land." The question for His Honor's decision was whether the section applied to personalty as well as to realty. I submit that neither the Act 40 Vict., No. 20, nor any other Act alters the course of distribution, and that personal estate was not meant to be dealt with in the same way as real estate. [He also quoted section 4 of 38 Vict., No. 1, "Intestate land not heritable, but to pass as personalty."]

HIS HONOR.—I have a note written against that section, "Therefore husband will take all land of wife as her administrator."

Mr. McIntyre.—I agree that the section only refers to land. Next in order was the *Married Women's Property Act* 1883, which conferred power upon a woman to devise the whole of her property. *Mr. Justice Stirling*, in *in re Lambert* (39 Ch. D. p. 626), upon the question whether the *Married Women's Property Act* had altered the devolution of a married woman's property if she died intestate, decided that the *Married Women's Property Act* had not altered the devolution, and the right of the husband accrued as if the separate right never existed. The only

Statute on which the Curator could rely was the *Deceased Persons Estates Act* 1885, section 2, but that the section could not be reasonably constructed to apply to personalty. The word "disposable" used in that section I interpret to mean "saleable," and clearly applied only to real estate. [He also quoted the Victorian law on the subject, the *Administration and Probate Act*, 54 Vict., No. 1060, sec. 8, sub-sec. 4, and the *Married Women's Property Act* 54 Vict., No. 1116.] I therefore ask that the Curator be ordered to pay over the balance of £450 after the expenses had been paid.

The *Solicitor General*:—An important question has been raised, whether the money should go wholly to the husband or to the next of kin. Down to the date of 49 Vict., No. 20, the old devolution of personal property was not altered, and the husband held the undoubted right to the property of his wife. The Act 49 Vict., No. 20, was passed because of the unfairness of the previous Act, 38 Vict., No. 1, the chief object of 49 Vict., No. 20, being to provide that the husband should not take the whole of the property of his wife. The portion of section 2 of 49 Vict., No. 20, "Upon the death of any married woman intestate, any land which she may have been entitled in fee simple or for any estate enduring beyond her life shall go to and vest in her legal personal representative and be disposable in like manner as other personal assets," etc., had been interpreted by his learned friend to apply to real estate only, but it seemed to him that it was quite as unjust for a man to have all the personal as all the real estate of his wife, and, moreover, it was arguable that the section was meant to apply to the personal estate of an intestate as well as to land. His learned friend had interpreted the word "disposable" to mean "saleable," but if the word "disposable" was deleted and "saleable" inserted, it would be making an Act of Parliament, a thing, which they could not do. Again, his friend had argued by analogy in bringing forward the Victorian law which had expressly men-

tioned personal as well as real estate. Well, they all knew from bitter experience how Acts were passed; not only here but in England they found directly after they became law they were liable to all kinds of interpretations, and often failed to provide for the very objects for which they had been passed. I submit that "personal assets" means that money, as well as land, is not to go to the husband absolutely.

HIS HONOR: the law before the passing of 38 Vict., No. 1, with reference to real estate left by a married woman was that the husband was tenant by courtesy, with the right to take rents during his life, and the property after his death to go to the heir-at-law, which at that time was the eldest son, or if only daughters equally amongst them. When 38 Vict., No. 1, was passed, and it was decided that real estate should go like personal estate, the devolution of real estate was altered, and he thought unwittingly. It was then I made a note that the husband would take all his wife's land instead of a life interest in it only. This Act (38 Vic. No. 1) was apparently to amend what was manifestly an injustice, and 48 Vic., No. 20, was passed to provide that the property should not go to the husband absolutely, but one-third to him and two-thirds to the children. That was making a fairer distribution, and the question I have to decide is whether that alteration affects personal estate. The *Deceased Persons Estates Act*, section 4, did not affect personal estate, but only land, and the second section of 49 Vic., No. 20, purported to apply only to real estate and chattels real, land being specially mentioned. I think also the word "disposable" means that the property might be sold. To alter the devolution of personal estate from the course which it had taken ever since the English law had been known was something that should not be done except by direction of the Legislature. I do not feel any difficulty about the case, the section applying only to land and not to personal estate, and therefore make an order as desired by the petitioner; costs to come out of the estate.

END OF VOLUME XIII.

AN ANALYTICAL DIGEST

OF THE

CASES REPORTED IN THE AUSTRALIAN LAW TIMES REPORTS.

FOR THE YEAR 1891-2,

VOLUME XIII.

COMPILED BY JAMES C. ANDERSON, ESQ., LL.B., BARRISTER-AT-LAW.

VICTORIA.

Abandonment of Goods—See Common Carrier. *Boyes v. Moss*, 271.

Accounts—See Practice (Probate). *In will of McCallum*, 215.

Action on judgment in New South Wales—Insolvency of judgment debtor in New South Wales—Action in Victoria on judgment—Forum of obligation—A obtained two judgments against B in the New South Wales Courts. Shortly after B's estate was sequestrated and A proved for the amount of his judgments upon B's estate. Subsequently A brought an action in the Supreme Court of Victoria on these two judgments. Held that as all persons were prohibited by the law of New South Wales from bringing actions against an insolvent and as New South Wales was the forum of the obligation therefore the debtor could not be sued here. *Spalding v. Bailey*, 38.

Administration and Probate Act 1890 (No. 1060) sec. 23—Trial by jury—It lies on the applicant to show by affidavit that there is a question of fact fit to be tried by a jury. The mere assertion that the mental capacity of the testator will be in dispute does not necessarily constitute such a fit case. Semble—It is for the judge at the trial to order that the matter should be heard before a jury if he think fit. *In will of Dixon*, 157.

—s. 23.—In this case a caveat was lodged against the grant of pro-

bate to the Trustees Executors and Agency Co., the duly appointed agents of the executors under the will. Upon the return of the rule *nisi* the case was set down for hearing before a judge without a jury. Upon the case being called on for trial application was made for the case to be heard before a jury. Held that such time was not the proper time for making the application and the trial of the action was directed to proceed. *In will of Towt*, 168.

—sec. 23 — Caveat — Question of fact—Jury—Sec. 23 is intended for the assistance of the judge before whom an order *nisi*, calling upon a caveator to show cause, is heard, so as to enable him, if he so desire, to have the assistance of a jury—A party to the proceedings is not entitled to apply to have the questions of fact tried by a jury before the hearing. *In will of Sturrock*, 179.

—s. 23—The proper time to apply for a jury in a probate action is the day on which the order *nisi* is made returnable and not on the day on which the trial is set down for hearing. Where the caveator propounds a codicil to the will propounded by the executors and does not object to the will, the caveator must begin. *In will of Sturrock*, 241.

—s. 23—Will—Caveat—Application for jury. The proper time to apply for a jury in a probate action is the day appointed for the return of the order *nisi*—Neither of the parties has a right to a jury, and it is a matter entirely within the discretion of the Court—Where the caveator applied for a jury and to be allowed to support his application by affidavits, both applications were refused on the

ground that the executors objected. *In will of Hill*, 284.

—s. 116—The words "property devised or bequeathed to the widow of a testator" in section 116 of the Administration and Probate Act 1890 clearly relate to property in Victoria, and strictly construed would justify a reduction of the percentage chargeable for duty only in cases where property in Victoria is specifically devised or bequeathed to the widow, but where it can be proved to the satisfaction of the master that a general legacy is necessarily payable either wholly or in part out of the proceeds of property in Victoria the master would be justified in allowing a proportionate reduction. Where a legacy to a widow is not specific and it appears that there is property outside Victoria from which it might be paid, the burden of proving that the duty payable on the Victorian assets is subject to a reduction in respect of the amount of such legacy lies upon the executor claiming such reduction. *The Queen v. Builer*, 291.

Administrators—See Practice, (Probate).

Adverse possession as against infant. See Landlord and Tenant. *Foley v. Egan*, 57.

Agent—See Principal and Agent.

Aggrieved, meaning of—See Justices Act 1890. *Hetherington v. Driscoll*, 42.

Appeal—Notice of appeal, application to discharge. Where a Notice of Appeal has been lodged, but no steps to have the appeal set down for hearing have been taken by the appellant within the time specified by the rules,

the Court will not grant a rule nisi calling upon the appellant to show cause why such notice should not be discharged, unless the appellant can show that he is hurt by the existence of such notice. *Short v. Davidson*, 279.

Arbitration—Rules of Supreme Court 1884, Order LXIV. r. 14—9 & 10 William III, cap. 15—Supreme Court Act 1890 (No. 1142), sec. 149—Arbitration—Award—Reference back to arbitrator. All applications to set aside an award, whether such award be within 9 & 10 William III, cap. 15 or not, must be made before the last day of the sittings next after such award has been made and published to the parties. An application under sec. 149 of the Supreme Court Act 1890, to remit the matter to the arbitrator for re-consideration must be made within a reasonable time. *Shirrefs v. Johnston*, 1.

—On motion for judgment upon a referee's report the court in coming to its decision must discard absolutely all exhibits used at the trial before the referee except such as are made part of the referee's report. A departure from a sealed contract is valid and enforceable, when such departure is the wrongful act of the defendant submitted to by the plaintiff, and of which the defendant has had the benefit. The Court will decide specific performance of a parol variation, by agreement of parties, of a sealed contract, when the contract so varied has been fully performed by the plaintiff. *Moore v. Ferguson*, 185.

Arbitrator, reference back to. See Arbitration. *Shirrefs v. Johnston*, 1.

Architect's Certificate—See Justices Act 1890. *Hetherington v. Driscoll*, 42.

Attachable Debt—See Justices Act 1890. *Barker v. Bremner*, 150.

Auction Sales Act 1890, ss. 3 & 21.—A person who tenders for sale a particular article, describes its merits, and offers it to any person who will pay a particular price for it, and then proceeds to offer similar or other articles to other persons willing to pay the same or a certain fixed price therefor comes within the second head of the definition of "sales by auction" given by section 3 of the Auction Sales Act 1890, and such person may, for selling in such manner after sunset, be convicted under section 21 of the Act. No general rule can be laid down as to whether the improper admission or rejection of evidence is a valid ground of objection in all cases of orders to review the decisions of Justices. *Sherson v. Agnew*, 205.

Authority, breach of warranty of. *Brown v. Robertson*, 11.

Award, setting aside. See Arbitration. *Shirrefs v. Johnston*, 1.

Bill of Lading. See Common

Carrier. *Boyes v. Moss*, 271.

Borrowing Power. See Company. *Brighton &c. Coy. v. Howden*, 52.

Building Societies Act 1890 (No. 1064) sec. 29 (III).—Building Society—Voluntary dissolution—Judgment against Society—Stay of execution—Proceedings for voluntary dissolution under sec. 29 (III) of Act No. 1068 are not equivalent to the voluntary winding up of a Company, and do not deprive a judgment creditor of his right to enforce his right by execution. *Brown v. Royal Permanent Building Society*, 285.

Burden of Proof. See Evidence.

Call, non-payment of—Directors' default. See Mining Companies Act 1871. *Haddow v. Duke Coy., No Liability*, 4.

Cattle—See Pounds Act 1890. *Ross v. Costello*, 215.

Caveat—See Transfer of Land Act 1890. *In re Talbot & Kelly*, 270.

Certiorari—Coroner's Court—The Supreme Court has power to grant certiorari where irregularities appear on the face of proceedings of a Coroner's Court. *In re Harley*, 160.

Commission—See Practice (Probate).

Common Carrier—Bill of lading. Lightermen as common carriers. Contract by master or agent of ship. Right of consignee as undisclosed principal to sue on. Abandonment, who may sue after. The customary clause in a bill of lading providing that "consignees or their agents must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the master or agent shall be at liberty to land and warehouse the goods, or discharge them into a store, ship, or hulk, or into lighters, or on a wharf, as customary, at the merchant's risk and expense," gives the master or agent of the ship an implied authority to make, as agent of the consignee, a contract with lightermen and others for the carriage of goods from the ship's side to some safe and convenient place, and the consignee as the undisclosed principal of the master or agent of the ship, may, if he so elect, bring an action in his own name upon such contract. An insurer of goods may, after a complete abandonment of such goods to the underwriters, bring an action in his own name for the recovery of the value of the goods, for and on behalf of the underwriters. The question whether a person is or is not a common carrier, is always a question of fact. Lightermen who hold themselves out to and who do carry at current rates for any persons who desire to employ them, are common carriers. *Boyes v. Moss*, 271.

Companies Act 1890 (No. 1074) sec. 93—List of contributories—Where

the memorandum of association authorises shares to be issued at a discount they can be so issued, and any person taking such shares is not liable to pay anything on them. *In re Street and Coy.*, 35.

—(No. 1074) ss. 128, 129—A person who stands neither in the relation of creditor nor contributory to a company in the course of being voluntarily wound up cannot obtain an order to set aside the return of the liquidator. *In re Royal Land Company Limited, ex parte Imperial Banking Company Limited*, 85.

Company—The directors of a No-Liability Company are not bound to defend an action brought against the Company for money, honestly, though irregularly borrowed and applied for the purpose of the company. A single shareholder, cannot as such, and without in any way referring to or binding other shareholders, institute an action to obtain his proportion of damages alleged to have resulted from a mere irregularity affecting him in common with all other shareholders. Where a plaintiff sues in *forma pauperis*, costs incurred in the action prior to the order permitting him to sue in such form may be given against him. *Stanley v. Moore*, 2.

—Memorandum of Association—Ultra vires. The memorandum of association is the charter of companies registered under the Companies Act 1890 and any contract or any matter not included in the memorandum, which is to contain the objects for which the company is established, is *ultra vires* of the directors, and does not bind the company, and being, in its inception, void, it cannot be ratified. *Mountain Homes Land and Investment Co. Ltd. v. Marshall and others*, 39.

—Call—Borrowing power. The Articles of Association of a Company contained the following article:—"The directors may from time to time borrow for the purpose of the Company any sum or sums of money, but so that there shall not at any time be so borrowed a greater amount than one-half of the capital then already subscribed for, and all such sum or sums of money so borrowed as aforesaid may be secured by loans, debentures or other obligations of the Company or by mortgage of the whole or any part of the property of the Company or otherwise as the directors may from time to time deem advisable." Held that the giving of a mortgage to a vendor to the Company to secure the payment of unpaid purchase money was not a "borrowing" under this article. *Brighton &c. Co. v. Howden*, 52.

—The directors of a company which had existing liabilities sold the machinery of the company which constituted the whole of its available assets and out of the proceeds arising

from such sale two dividends were declared and paid. In an action by the liquidator of the company against the directors and the manager it was held that the plaintiff was entitled to recover from the directors as much of the sum obtained from the sale of the machinery as would be necessary to satisfy all the creditors of the company. Held also that no action would lie against the manager as he was merely the servant of the company. *Mackie v. Clough*, 122.

—Paid up shares—Contributory. —In the absence of special statutory provision, the liability of the shareholder to contribution in the case of liquidation of a company depends on the terms of the contract, as based upon the statutory documents which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other. The contract as it exists at the time of winding-up is the sole measure of liability and the Court cannot expand the contract nor fix upon the party a new engagement larger or other than that into which he has entered. *Re Street and Coy*, 126.

—*Ultra vires*—Directors—Parties. Where a company enters into contracts alleged to be *ultra vires*, with third parties, the proper party to sue for the recovery from the directors of money paid under these contracts, is the company, unless special circumstances be proved, as for example that the company refuses to sue. If relief is claimed against the third parties they should be made parties to the action. *Nankirell v. Benjamin*, 282.

Compensation—See Sale of Land. *Roberts v. Balfour*, 63, 181.

Condition precedent—See Justices Act 1890. *Hetherington v. Driscoll*, 42.

Consideration—See Contract. *Nyulasy v. Rowan*, 10.

—See Contract. *Dunton v. Dunton*, 220.

Constructive Trust. See Real Property Act 1890. *Foley v. Egan*, 57.

Contempt of Court—Article in newspaper—Pending an action. In determining whether the discussion in a newspaper of a pending action amounts to a contempt of Court, the Court must come to the conclusion that the fair hearing of the action will be prejudicially affected. A "mere tendency" to affect such fair hearing is not sufficient. It must be reasonably probable that an injustice may be done to one or other of the parties to the action. *Re Ebsworth*, 89.

Continuing Offer—See Contract. *Nyulasy v. Rowan*, 10.

Contract, Alterations in. See Sale of Land. *Shaw v. Brodie*, 12.

Contract, Specific performance. See Sale of Land. *Guest v. Watson*, 66.

—**Consideration**—Continuing offer. If a man makes an offer, either to buy or to sell, and promises to keep that offer open for a given time, and there is no consideration, he is not bound, and may withdraw his offer at any time before it has been accepted because till then, there has been no agreement between the parties; but, if after the offer is made, while it is open and unrevoked, the other party duly accepts, then there is an agreement and both are bound. *Nyulasy v. Rowan*, 10.

—**Warranty**—See Life Assurance. *Ballantyne v. Mutual Life Insurance Coy. of New York*, 21.

—Where there has been a breach of contract to deliver shares, the plaintiff is entitled to elect, as the measure of damages, whether he will take the market value of the shares at the time of the breach or at the time of the trial. The market value of a commodity is the price at which somebody is willing to sell and somebody is willing to buy, and not the price at which there are sellers but no buyers. *Vickery v. Coley*, 68.

—**Mutual mistake**—Rectification. Rectification of a written instrument—on the ground of mutual mistake will not be granted by the Court, unless it be proved convincingly that the mistake was mutual; suspicion, even strong suspicion is not sufficient. The Court will not vary a written instrument on the ground of plaintiff's mistake unless it be shown that the error was induced by some statement or conduct of the defendant. *Quere* whether the Court will not reform a contract, required by law to be in writing, and enforce specific performance of it, where a plaintiff has been drawn into executing it by a mistake as to its contents wilfully induced by the defendant, and has fully or even in great part performed what owing to such mistake he conceived to be the contract. Money paid to A in pursuance of a contract for the supply of gravel to him in excess of the value of the gravel supplied, cannot be recovered back when such over-payment was not made under a mistake of fact, but was made because A could not make up his mind whether he would continue taking the gravel or not. *Chamberlain v. Thornton*, 188.

—**Consideration**. (Per Higinbotham, C.J., and Williams, J.; Hood, J., *dissentiente*).—An undertaking by a divorced wife to "conduct herself with sobriety and in a respectable, orderly, and virtuous manner," is a sufficient consideration to support a promise by her late husband to pay her a certain sum of money per month while she shall so conduct herself. (Per Hood, J., *dissentiente*): Such an agreement is void for uncertainty. (Per Higinbotham, C.J.)—A

promise not to do or to do something which the promisor may lawfully and without wrong to the promisee do or abstain from doing is a good consideration to support a promise by the promisee. *Dunton v. Dunton*, 220.

Contributory—See Company, *Street & Coy.*, 126.

Coroner's Court—See Certiorari, *In re Harley*, 180.

County Court Act 1890 (No. 1078), sec. 50—Action on Contract—Remission to County Court—Appearance—Applications to remit actions to the County Court under sec. 50 of Act No. 1078 can be made before entry of appearance. The intention of the plaintiff to apply for final judgment under Order XIV., r. 1, is not good cause within the meaning of the section. *Hwolett v. Leslie*, 77.

—(No. 1078) sec. 51—Visible means—Remission to County Court—The primary obligation of satisfying the judge that the plaintiff has no visible means lies upon the party making the application—Where in an application under sec. 51 of Act No. 1078, the defendant 'in his affidavit baldly swore that the plaintiff, if unsuccessful, had no visible means of paying the defendant's costs, and the plaintiff as baldly swore that she had such means. Held, that the defendant had not satisfied the judge that the plaintiff was without visible means. *Lew Kim v. McLennan*, 61.

—s. 51—Action for tort—Application to remit—Powers of judge. In remitting an action of tort to the County Court, the judge is only empowered to name in the order a place for the trial of the action at which a County Court is from time to time held; he is not empowered to fix any particular Court to be held at that place. *Greening v. Pollard*, 88.

—s. 133. An appeal will lie to the Full Court from an order of the County Court, interlocutory as well as final. *Caffyn v. Howard Smith and Sons, Ltd* 276.

Covenant—See Mortgage. *Dismorr v. George*, 106.

Crimes Act 1890 s. 54—Bigamy—Knowledge of accused—Evidence. Statements made in the accused's presence by accused's first wife prior to the second marriage to the effect that she had been married to a man still living at the time of her marriage with the accused, are evidence on behalf of the accused. *The Queen v. McMahon*, 32.

—ss. 100, 527—Informant—Penalty. An information for an offence against an enactment for the benefit of the public at large may in general be laid by anyone, independently of any authority from the party or parties to whom the penalties to be recovered are awarded by law; and in such a case where no form of

information is expressly authorised the information should purport to be laid in accordance with the law which determines the parties for whose benefit the penalties are to enure wholly or in part. *Sargood v. Veale*, 121.

—s. 196—Verdict—Recommendation of jury and reasons therefor no part of finding. Two prisoners were presented under section 196 of the Crimes Act 1890 for "unlawfully and maliciously setting fire to a fence." The jury returned a verdict of "guilty with recommendation to mercy on the ground that there was no malicious intent." Held, on motion for a rule calling on the learned judge who presided at the trial to state a case for the opinion of the Full Court that the recommendation of a jury or the reasons given for it formed no part of their finding. Held also that the jury must be understood to have meant an absence of some malicious intent not inconsistent with the malice which necessarily formed part of their verdict of guilty. *Reg. v. Morce and Holly*, 262.

—ss. 481, 485. The affidavit in support of an application under section 485 of the Crimes Act 1890 for a rule nisi for a writ of mandamus directed to a judge to show cause why he should not state a case under section 481 of the Crimes Act, 1890, should expressly state that the person who deposes to the facts was present in Court during the hearing of the trial. *Reg. v. Morce and Holly*, 268.

—1891 s. 33 (2) A prisoner was charged with committing an indecent assault upon a girl eight years of age. The unsworn testimony of the child was received under section 33 of Act No. 1231, and other evidence was also given which strongly corroborated her story, but the only evidence implicating the accused was the girl's description to the mother of the person who had assaulted her and her identification afterwards of the prisoner as the person who had assaulted her who tallied with the description given by the child to her mother immediately after the offence was committed. The prisoner was convicted and sentenced but the learned judge feeling some doubt whether the conviction could be sustained stated a case for the opinion of the Full Court. Held that as section 33 (2) of the Crimes Act 1891 made it necessary that the child's evidence should be corroborated by some material evidence implicating the accused the conviction could not be sustained and that evidence merely corroborative of the child's testimony on other points was insufficient to sustain the conviction and the conviction was quashed and a new trial ordered. (Per Higinbotham C. J.)—Such corroboration can only be given, so as to implicate an accused person, if the child knows at the

time of the assault the person who has assaulted her, or if some other testimony exists independent of that of the child by which the assailant can be identified. (Per Hood J.)—There must be some other material fact proved altogether apart from the child's story and apart from evidence confirming her credibility which tends to establish the guilt of the prisoner. *Reg. v. Gregg*, 264.

Customs and Excise Act 1890, ss. 158, 164—Direction of Chief Inspector of Distilleries. In a proceeding under the Customs and Excise Act 1890, it is not necessary for the informant to prove the direction of the Chief Inspector of Distilleries to the informant to lay the information. *O'Connor v. Seigler*, 115.

Damages, measure of—See Contract. *Vickery v. Foley*, 68.

Debts owing or accruing—See Justices Act 1890. *Hetherington v. Driscoll*, 42.

Device—See Trade Mark. *Mitchell v. Joshua*, 131.

Directors—See Company. *Nankivell v. Benjamin*, 282.

—defence of action by. See Company. *Stanley v. Moore*, 2.

—Acts done by *de facto* directors. *Haddow v. Duke Gvy.*, No Liability, 4.

—liability of, where dividends declared and paid out of capital. *Mackie v. Clough*, 122.

Dividends out of capital. See Company. *Mackie v. Clough*, 122.

Divorce—See Marriage.

Equity of redemption—See Mortgage. *Dismorr v. George*, 106.

Evidence—See Pounds Act 1890. *Ross v. Costello*, 215.

—Bigamy—Statements made in the accused's presence by accused's first wife, prior to the second marriage, to the effect that she had been married to a man still living at the time of her marriage with the accused are evidence on behalf of the accused. *The Queen v. McMahon*, 32.

—of marriage. See Marriage. *Picaud v. Picaud*, 92.

—Improper admission or rejection—No general rule can be laid down as to whether the improper admission or rejection of evidence is a valid ground of objection in all cases of orders to review the decisions of justices. *Sherson v. Agnew*, 205.

—Burden of Proof. The plaintiff was, on the 17th October, 1888, the registered holder of 1000 shares in David Munro & Co., and on that day he instructed his brokers to sell the shares, and for the purpose of facilitating business the shares were transferred to one O'Hanlon, a clerk in the broker's office, who was also registered as the holder of a number of

other shares in the same company. None of the shares in this Company were numbered or otherwise distinguishable one from the other. O'Hanlon was a minor and, therefore irresponsible. On the same day, October the 17th, the defendant purchased from O'Hanlon 100 of the plaintiff's shares receiving a blank transfer of them which he delivered to the purchasers to whom he sold the shares a few days after he purchased. The remaining 900 shares appeared by the register to have been transferred to different purchasers between October the 23rd and the 31st, 1889. On July the 9th, 1890, 100 of the shares transferred by the plaintiff to O'Hanlon were by order of the Supreme Court re-transferred by O'Hanlon to the plaintiff, and the plaintiff, as the registered owner of these 100 shares, was compelled to pay two calls on them amounting to £50, and he brought an action in the County Court to recover this amount as money paid to the defendant's use, but was non-suited on the ground that there was no evidence to identify the shares on which the plaintiff had to pay the call with the 100 shares sold to the defendant. Held on appeal that the plaintiff, having proved that the transfer of 900 of the shares had been registered, and that none of them were registered in the defendant's name, coupled with proof that he had been compelled to pay calls on the remaining 100 was sufficient evidence to launch the plaintiff's case. Held also, that if the defendant had obtained a registration of the shares purchased by him into the name of his transferee or nominee, that that would be a matter entirely within his own knowledge, and that he would therefore have to prove it in order to rebut the plaintiff's *prima facie* case, and the judgment of non-suit was set aside and judgment entered for the plaintiff, subject to the defendant desiring a new trial. *Gurden v. Brunon*, 260.

Executors—See Practice. *L'oblate*.

Explosives Act 1885. The Ammunition Factory Act 1889. A general Act is controlled by a special Act relating to the same subject matter, and the provisions of the general Act must yield to those of the special Act in so far as they are inconsistent with them. The Ammunition Factory Act 1889 ratifies a lease, the terms of which are inconsistent with the Explosives Act 1885 (reproduced in the Explosives Act 1890) and authorises the erection and carrying on of an ammunition factory free from the means of control created by the last mentioned Act. (Per Williams, J.) The ammunition factory authorised by the Ammunition Factory Act 1889 is something altogether outside the Explosives Act. *Whitney v. Justices of Footscray*, 253.

Fence—See Local Government Act

1890. *Steele v. Mayor of Essendon*, 7.
Forfeiture of shares for not payment of call—See Mining Companies Act 1871. *Haddow v. Duke Coy., No Liability*, 4.

Fraudulent imitation.—See Trade Mark. *Mitchell v. Joshua*, 131.

Guardian—See Infant.

Hawker—See Police Offences Act 1890. *Murphy v. Lee*, 43.

Health Act 1890 s. 234—Notice—Plans—In a notice under s. 234 it was stated as follows:—"—street is to be formed, etc., according to the levels and specifications approved by the said council, and detailed, shown, and set forth in the plans and documents hereunto annexed; counter-parts of such plans and documents can be inspected at the office of the town clerk of the said council in the town hall of the said city. The annexed plan did not specify the longitudinal sections without a specification of which the work could not be done. Held that the notice was defective. *Adkins v. Kilpatrick*, 31.

Husband and wife—See Marriage.

Imitation, fraudulent. See trade mark. *Mitchell v. Joshua*, 131.

Imprisonment of Fraudulent Debtors Act 1890, s. 22, sub-sec. 2—Amendment of order by Supreme Court—Justices Act 1890 s. 147. The offence under section 22, sub-sec. 2 of the Imprisonment of Fraudulent Debtors Act 1890 is not complete unless it is proved not only that the defendant had the means to pay, but also that he had the ability to pay. The Court will not under section 147 of the Justices Act 1890, amend an order of justices unless it be clearly proved to the satisfaction of the Court that there was sufficient evidence before the justices on which they would have been justified in drawing up the order free from any defect. *Watson v. Ryan*, 183.

—1890, schedule IV. form I. Debtor's summons. Form I. schedule IV. of the Imprisonment of Fraudulent Debtors Act 1890 is defective in that it does not state the day on which the debtor is to appear to answer the summons, and unless the debtor does in fact appear in answer to such defective summons no order can be made against him. *Grigg v. Bennett*, 282.

Infant, adverse possession as against. See Landlord and Tenant. *Foley v. Egan*, 57.

—A., the mother of an infant 3 years of age, agreed with B. to hand over the infant to him in consideration that he would provide, clothe, maintain and educate the infant, B. to have the custody of the infant until he should attain the age of 21 years. After the infant had been in

the custody of B for 5 years, A obtained a writ of habeas corpus for the delivery up of the child to her. Held that the mother, notwithstanding that she had made an agreement of the above character, was entitled to possession of the child, and the child was ordered to be delivered over to her. *In re Warren*, 121.

—Administration suit—Ward of Court—Guardian—Where a testamentary guardian of an infant is domiciled out of the jurisdiction of the Court, the Court will appoint a co-guardian domiciled within the jurisdiction to act with such testamentary guardian. *MacPherson by her next friend, Hume, v. Union Trustee Coy. of Australia Limited*, 250.

Informant, who may be—See Police Offences Act 1890. *Re Goodison*, 165.

Insolvency—Uncertificated insolvent—Payment of debts of insolvent incurred subsequent to insolvency—An uncertificated insolvent with the knowledge and permission of his trustee in insolvency and the creditors under the insolvency contracted liabilities subsequent to the insolvency. Held that the subsequent creditors were entitled to payment of their debts in priority to any of the creditors under the insolvency. *Shaw v. Hyett*, 116.

Insolvency Act 1890—Powers of a judge of the Court of Insolvency. A judge of the Court of Insolvency, as well as the Court of Appeal, is under no obligation, though he has the power to set aside an order of sequestration, which is bad. *Re Myers*, 41.

—s. 37. A petitioning creditor who in his petition states that he holds a security for his debt, and that he values it at nil, need not also offer to give it up for the benefit of the creditors—Where the respondent obtained leave to file objections *nunc pro tunc*, and in his affidavit in support verified three objections but filed four, the fourth not being verified, he was allowed at the hearing to verify it—Where the sheriff's officer under a writ of fi fa., made a demand for payment on the respondent at 5 p.m. and not obtaining it thereupon made a return to the writ of *nulla bona*, held that the respondent had not a reasonable time to pay, and order discharged. *In re Elkington*, 240.

—sec. 37 (VIII.)—Lunatic—*Quere* whether the proviso in sub-sec. VIII. of sec. 37 can apply to a lunatic. *Re Opitz*, 169.

—ss. 67(5), 76, 77—Supreme Court Act 1890 ss. 174, 176—Insolvency—Goods seized by the Sheriff under a fi. fa. are a security for the judgment debt, and the judgment creditor petitioning for the judgment debtor's insolvency must in his petition either offer to give up or value that security, although on the order being made

absolute the security becomes valueless. *Re Kennedy*, 227.

—s. 70 sub-s. 5—Reputed ownership—Question of fact. The doctrine of reputed ownership only applies when goods are held in such a situation as to convey to persons exercising reasonable judgment the belief that they are the property of the insolvent when in possession of them, which is always a question of fact. *Hantrive v. Birch*, 165.

Instruments and Securities Statute 1864, s. 59, Act No. 557, s. 1. Instruments Act 1890, s. 133—

Costs. A document by way of absolute transfer, and under which possession of the goods comprised therein is given and for which goods the purchase-money has been paid, is a bill of sale within the meaning of the Acts relating to bills of sale, and is of no effect either at law or in equity unless it be registered, and the subsequent payment of the purchase-money and the taking possession, if done in pursuance of such bill of sale, will not vest the property in the purchaser. Where a trader has commenced and carried on business with the goods comprised in such bill of sale as heretofore mentioned, and has sold some of the goods and has added to his stock by purchasing other goods, partly with the proceeds arising from the sale of the goods comprised in the bill of sale and partly on his own credit, the grantor or his representatives are not entitled to seize the goods so purchased and added to the stock, though they may be entitled to seize such of the goods included in the bill of sale as remain in the possession of the grantee. Where a plaintiff has succeeded on some and failed on other issues raised by his action the Court will not give special directions as to the adjustment of the costs between the parties if such directions would tend to hamper the taxing officer when dealing with such costs. *Askew v. Danby*, 123.

Instruments Act 1890, s. 50, sub-secs. 12 & 13—Promissory note—Due notice of dishonor. An endorsee and holder of a promissory note sued the endorser of the note, and the defence set up was no sufficient notice of dishonor. It was proved that the plaintiff's agent, in whose hands the note was for collection, did not give the plaintiff due notice of the dishonor in accordance with section 50, sub-sec. 13 of the Instruments Act 1890. It was also proved that though the plaintiff did not receive due notice of the dishonor from his agent, yet he received notice in time to enable him to give due notice of the dishonor to the defendant within the provisions of the above sub-section. Held that the defendant had due notice of the dishonor of the promissory note. *Henderson v. Horne*, 292.

—Sec. 132—Bill of Sale—As-

signment for the benefit of creditors—Registration as a Bill of Sale—What constitutes an assignment for the benefit of creditors so as to bring the document within the provisions of sec. 132 of Act No. 1103.—*Breston v. Donaldson*, 286.

—Sec. 146—Bill of Sale—Consideration—Secret condition. W. gave a Bill of Sale over his stock-in-trade to A. & Co., having shortly prior to the giving of the same obtained from A. & Co. a guarantee for an overdraft for £1000, but such guarantee was not strictly agreed to be put into the Bill of Sale as part of the consideration therefor, but was something collateral. Held that though the giving of such guarantee no doubt gave W. another motive for signing the Bill of Sale, which he probably would not have signed without it, yet such guarantee was no part of the consideration for the Bill of Sale, and therefore it was not necessary to include it in the notice of intention to file the Bill of Sale. W. gave a Bill of Sale over his stock-in-trade to A. & Co., in which was a condition that his stock was not to be reduced below £9000, but there was also an understanding between the parties that A. & Co. would have no objection to the stock being reduced below that amount if all monies received for the sale of any stock reducing the stock below that amount were paid to the credit of A. & Co. Held that this was not a secret condition invalidating the Bill of Sale. *Dunby v. Australian Financial Agency Co., Ltd.*, 95.

—s. 208.—Agreement for a lease—Part performance—Specific performance. Where the defendant verbally agreed to rent the plaintiff's house for five years, and in pursuance of that agreement, and at the defendants' request the plaintiff made certain alterations in the house, specific performance decreed or at the defendants' election damages. *Kaufman v. Michael*, 279.

—Part VI.—Sale to defeat creditors—Bill of Sale.—13 Eliz. ch. 5, Act No. 557. In order to avoid a sale under 13 Eliz. ch. 5, it is necessary that good consideration shall not have been given, and that the person to whom the property is assigned shall not have received it *bona fide*, but with notice of the fraud of the assignor. In determining whether a document is or is not a bill of sale the later decisions go to show that the Court will look at the real transaction between the parties and ascertain the actual truth of the case, and will hold that a document, although informal in character, is a bill of sale, if it is shown to be either a muniment of title to the goods, without which there would be no transaction between the parties, or a depository of the final intention of the parties, and therefore necessary to be put in evidence in proof of the transaction.

Act No. 557 (reproduced in the Instruments Act 1890) with the exception of section 11 applied only to transfers by way of mortgage or security and does not include absolute transfers. *Askew v. Danby*, 255.

Judgment, Form of, against married woman. *Shepherd v. Penglase*, 202.

—Variation of.—Motion to vary a judgment—Costs. The Court has jurisdiction to vary its judgment up till the time of the drawing up of the order. The party who renders a motion to vary the judgment necessary, must pay the costs of the motion. *Askew v. Danby*, 278.

Judicial Separation.—See Marriage.

Justices Act 1890, s. 23, (1). (Per Higinbotham C. J., and Hood J., *Williams J. dissentiente*). The words "his place of business" in section 23 (1) of the Justices Act 1890 are not limited to cases where the defendant is the master or one of the masters of the business but extend to cases where the defendant is merely employed as a servant or officer. (Per Williams J., *dissentiente*) "His place of business" in section 23 (1) of the Justices Act 1890, means the place of business of the defendant, the place where he carries on business and of which he has the control. *Nixon v. Ah Fook*, 223.

—s. 116.—Order to review.—Detention of prisoner's property—Garnishee—Attachable debt—Jurisdiction. A. R. B. was arrested in New Zealand on a charge of obtaining money under false pretences. When arrested a large sum of money was found on him, the greater portion of which was converted into a bank draft and forwarded to the police in Victoria. An execution creditor of A. R. B. took out a summons to attach part of this sum in the hands of C., Chief Commissioner of Police in Victoria. The police magistrate who heard the summons made an order directing C. to pay the execution creditor the sum of £54 1s., the amount of the judgment debt. An order to review this order was obtained. Held, that even assuming that the detention of the money from A. R. B. by the authorities in New Zealand was a wrongful detention, still inasmuch as there was no evidence that A. R. B. had waived such tort, the police magistrate had no jurisdiction to make the order he had made. *Barker v. Bremner*, 150.

—s.s. 117, 118, 141.—Meaning of aggrieved.—Debts owing or accruing. The debtor in a proceeding under ss. 117, 118 of the Justices Act 1890, may obtain an order to review the garnishee proceeding under s. 141. When the payment of money is dependent upon a condition precedent e.g., the final certificate of an architect, no attachable debt is constituted

until the architect's certificate is given. *Hetherington v. Driscoll*, 42.

—s. 147.—The Court will not under this section amend an order of justices unless it be clearly proved to the satisfaction of the Court that there was sufficient evidence before the justices on which they would have been justified in drawing up the order free from any defect. *Watson v. Ryan*, 183.

Land Act 1884 sections 27, 59—Pastoral lease—Order of redemption—*ultra vires*—"Homestead." An order of the Governor-in-Council requiring for mining purposes all the land comprised in a pastoral lease, incorporating as conditions subsections b, 10, and 13 of section 27 of the Land Act 1884 is valid although the order purports to be made in exercise of the power conferred by sub-section 8. Payment of the requisite sum is a condition precedent to the exercise of the powers conferred by section 29 of the Land Act 1884. *Sander v. The Queen*, 173.

—s. 32.—Transfer of lease—Consent of Board of Land and Works. The plaintiff agreed to transfer to the defendant land leased under sec. 38, sub-s. 2 of the Land Act 1884 subject to the consent of the Land Department; the lease provided that the consent of the Board of Lands and Works should be obtained before assignment. Held that by "Lands Department" both parties intended "Board of Land and Works" and that consent by the latter satisfied the agreement. Held further, that there was no assignment until the transfer was registered, and that consent before such registration was sufficient. An agreement to assign a lease subject to such consent is not illegal as being in contravention of sec. 38 sub-sec. 2 of the Land Act 1884. *Bowen v. Wratten*, 267.

—s. 65.—Vendor and purchaser—Specific performance. A purchaser of land sold at an auction, where the title to the land is described as being under sec. 65 of the Land Act, cannot resist specific performance of the contract of sale on the ground that he has been misled by the description of the title. A vendor may be allowed to make title even after decree. A condition attached to the license under sec. 65 of the Land Act that the licensee shall enclose the land with a good and substantial fence does not mean that if there is already a good and substantial fence upon the land when the licensee goes into possession that he shall pull it down and erect another. Licenses granted under sec. 65 of the Land Act are licenses from year to year and though it is the practice of the department to grant renewals of such licenses, each so called renewal is really a new license so that a breach of the conditions of the license prior to the granting of the last so-called renewal

would not render the existing license liable to forfeiture. Where there is a condition in the contract of sale that all objections to and requisitions on title shall be made by the purchaser within a time certain, but the vendor is willing to go on negotiating about the title after the expiry of such time such condition is deemed to be waived. A vendor contracted to sell to a purchaser 48 acres of land, 26 acres of which were held under two licenses granted under sec. 65 of the Land Act. Held that such contract was illegal and could not be enforced in that sec. 65 of the Land Act only allows a licensee to hold 20 acres of land under a license granted under that section. Held also that the inability of the vendor to convey more than 20 acres was not a deficiency but a defect, and could not be compensated for either under the compensation clause in the contract or under the general law. Held also that even if it were a deficiency, the quantity was too large for compensation. *Harris v. Gollings*, 100.

Landlord and Tenant—Where a person goes into possession of land as a tenant at will and his occupation is beneficial to himself and not to his landlord, the possession of such premises becomes adverse to the owner either from the determination of the tenancy in fact or after the expiration of one year from its inception which is its determination in law and even though each party acts as before and believes his interest in the land to be the same as before. The Statute of Limitations begins to run against the owner from the time of such determination either in fact or in law. The words "shall be deemed to have determined" in section 23 of the Real Property Act 1890, mean "conclusively deemed." Where a person is put into the possession of land to protect the interests of an infant a constructive trust is created and even though the occupation be beneficial to himself and not to the infant the Statute of Limitations will not run against the infant during his infancy. *Poley v. Egan*, 57.

Lease—See Mining on Private Property Act 1884. *Carroll v. Wauldridge*, 151.

—mortgage of.—See Mortgage. *Diamorr v. George*, 106.

Legal Profession Practice Act 1891 sec. 11 sub-sec. 2 Barristers or solicitors admitted to practice in any part of Her Majesty's dominions, other than in Victoria, who seek to be admitted to practice as barristers and solicitors of the Supreme Court of Victoria, must not only prove that they have obtained a qualification of equal value to that prescribed by section 11 of the Legal Profession Practice Act 1891, but must also show that all the qualifications existing in that part of Her Majesty's dominions from which they come, are equal to

the Victorian standard created by the above-mentioned section. *In re Kerin and Lynch*, 226.

Libel—See Wrongs Act 1890. *Tompsett v. Wilson*, 54.

—Words necessary libellous—

Function of judge and jury. If words written or printed are not in their natural sense libellous, and the plaintiff fails to show by extrinsic proof that they were used in a libellous sense, it is the duty of the judge to withdraw the case from the jury; if such words necessarily bear a libellous meaning, it is the duty of the jury to find that they are libellous, and the Court will set aside a contrary finding; if such words are of doubtful import and may or may not bear a libellous meaning, it is for the jury to determine whether they are libellous or not. Per *a Beckett J.*—The Court will not set aside the finding of the jury that certain words do not import a libel unless there is no escape from a libellous interpretation. *Blaschki v. Smith* 104.

—Minister of the Crown—Absolute privilege—Per Molesworth, J.

—A Minister of the Crown is not absolutely privileged from actions of libel in respect of written statements made by him respecting the conduct of subordinate officers, although made in the course of his official duty. *McCormick v. Cuthbert*, 137.

Licensing Act 1885, ss. 56, 58—

Licensed premises—sanitary improvements—Service of copy of order on owner. In proceedings under s. 58, proof of service of the copy of the inspector's order on the owner is not a condition precedent to the right of the licensee to recover the expenses incurred by him, under s. 56, from the owner. *Foster v. O'Callaghan*, 9.

—1890 (No. 1111) s. 25—"Township" in that section means an aggregation of dwellings larger than a village

—This definition is not satisfied by a township proclaimed as such by the Governor-in-Council but containing no dwellings. *Reg. v. Bell*, 190.

—s. 148—Honest refusal to admit a constable into a hotel bar is not wilfully delaying admittance. *Thomas v. Ivey*, 190.

Life Assurance—Insurance—

Policy—"Die by his own act"—Estoppel. The representative of B, an insured, brought an action against the insurance company based upon a certificate or interim note of insurance on the life of B, dated 5th September, 1890, for the sum of £2,500, for the term of 4 months until 5th January, 1891. The application for the policy which was made by the certificate a part of the policy included a warranty by the insured that he would not die by his own act during a period of 2 years. Held, that the word "act" mentioned in the warranty, consisted of (1) an intent in the direction of an object known and understood (2)

of will (3) of a movement of the body conformable to the object intending and resulting directly from the exercise of the will. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist. *Ballantyne v. The Mutual Insurance Co. of New York*, 21, 161.

Lighterman—See Common Carrier. *Boyes v. Moss*, 271.

Local Government Act 1874, ss. 376, 384—Draining of roads—Powers of municipality. Held by the majority of the Court (*Higinbotham C.J.*, and *Hood J.* *dissentientibus*) that section 376 of the Local Government Act 1874 does not authorise a municipality, either expressly or by necessary implication, in making a road to make drains for the purpose of draining the road in such a way as to discharge water on adjoining land. *Carslake v. Shire of Caulfield*, 72.

—1890 s. 248—Valuation of rateable property—Crown grant subject to restriction. (*Per Higinbotham, C.J.*) Where land is subject to certain restrictions and conditions, such land is only to be rated upon the annual value which a hypothetical tenant from year to year would give for the land if let to such tenant subject to such restrictions and conditions. The Trustees of the Victorian Rifle Association v. The Mayor, etc., of Williamstown, 16 V.L.R., 251, corrected and assented to. In determining the rate to which land is subject under the Local Government Act 1890, the net annual value to the occupier, and not the net annual income, is the fact to be ascertained. Trustees to whom land is granted by the Crown in fee simple cannot ever become tenants from year to year of the land for the purposes of their trusts, and cannot therefore be taken into consideration as possible or hypothetical tenant of the lands. (*Per Holroyd, J.*) In assessing either the net annual value or the capital value of land for rating purposes, the Court has not to take into account any condition imposed by law respecting the application of the revenue that may be derived from such land, but it must take into consideration all restrictions and conditions imposed on the user of such land. The trustees of the Victorian Rifle Association v. The Mayor etc of Williamstown, 16 V.L.R., 251, questioned. (*Per a Beckett and Williams, J.J.*) Where land produces an income, the ultimate purpose to which such income is to be applied is not to be taken into consideration in ascertaining the annual

value of such land for rating purposes. The trustees of the Victorian Rifle Association v. The Mayor etc., of Williamstown, 16 V.L.R., 251, dissented from. (*Per* Hodges J.) Where it is admitted that land is rateable, but no satisfactory evidence of the annual value of such land is given, the only course open to the Court is to fix a nominal rate. The trustees of the Victorian Rifle Association v. The Mayor etc., of Williamstown, 16 V.L.R. 251, dissented from. (*Per* Hood J.) In arriving at the annual value of land for rating purposes, where such land is subject to various restrictions and conditions, the real test to be applied is, what would a tenant give for the land provided that he is to be subject to the restrictions and conditions attaching to the land. The trustees of the Victorian Rifle Association v. the Mayor etc., of Williamstown, 16 V.L.R., 251 assented to. *The Trustees and Council of the Royal Agricultural Society of Victoria v. The Mayor etc. of the Town of Essendon*, 242.

—s. 288—Rates—Demand for payment—A demand under sec. 288 of the Local Government Act 1890 may be sufficiently made by sending it through the post. *Shire of Dandenong v. Derritt*, 114.

—s. 405—Corporation—Fence—Negligence. A municipality is bound to keep in repair any artificial work of its own creation. *Steel v. Mayor of Essendon*, 7.

Lottery—A and B entered into an agreement that A was to obtain a ticket on their joint account in a £10,000 sweep on a horse race. A sent for a ticket on his own sole account in a £50,000 sweep, but did not inform B. of his change of intention. The £50,000 sweep, however, was full, and a ticket in the £10,000 sweep was returned to A. Held that the ticket must be deemed to have been taken on the joint account of A. and B. A. and B. obtained, on a joint account, a winning ticket in a lottery got up in New South Wales. The prize was paid to A, who refused to pay over to B his share of the prize. B sued for the amount. Held that though such a lottery would have been illegal in Victoria, yet as it was not illegal in New South Wales, A could not avail himself of the law against lotteries in Victoria to resist an action by B to recover his share of the prize money. *Flourance v. Hutchinson*, 15.

Marine Act 1890, s. 13—Master—Beneficial owner—*Locus standi*. The "master" in the 13th section of the Marine Act 1890 means the person who was the master at the time the vessel first became an obstruction to the navigation of the port. In a proceeding before Justices under the 13th section the beneficial owners of a ship

have no *locus standi*. *Musgrove v. Mitchell*, 62.

—ss. 177, 183, (2)—Evidence Act 1890 (No. 1088), sec 53—*Certiorari*. Service of a copy of the answers and of the judgment of the Court is a sufficient compliance with the provisions of sec. 177. Sec. 183 gives the Court power to find a person guilty of gross misconduct. An investigation by the Court does not come within the provisions of the Evidence Act 1890, and therefore the person charged is a competent witness in his own behalf. When *certiorari* will be granted. *In re Bell*, 158.

Market value—See contract. *Vickers v. Foley*, 68.

Marriage—Dissolution of marriage on the ground of desertion will not be granted while an uncanceled deed of separation executed by the parties remains in existence, provided that the right to relief had not accrued prior to the execution of the deed. *Humphries v. Humphries*, 191.

—The Court will not grant a decree nisi for the dissolution of marriage where the only evidence, that the person served with the petition is the petitioner's wife, is the uncorroborated evidence of the petitioner himself. *Picand v. Picand*, 192.

—Costs of petitioner suing in *forma pauperis*. In a suit for the dissolution of marriage by wife against husband the petitioner, if successful, though she sue in *forma pauperis*, is entitled to costs out of pocket. *Domec Carre v. Domec Carre*, 195.

Marriage Act 1890, s. 48—Illegitimate child—Evidence—Corroboration of mother's oath. In a complaint for the maintenance of an illegitimate child evidence by the alleged father that he is the father of a former child is admissible, and may be corroborative of the mother's oath. Contradictory statements given in evidence by the alleged father of an illegitimate child with respect to his intercourse with the mother of the child shortly prior to the conception of the child, may be corroborative of the mother's oath. *Galbally v. Watkins*, 210.

—s. 74 (c). The respondent was convicted in New South Wales in 1887 for obtaining money under false pretences and served a sentence of uncertain duration. Early in 1888 he was convicted in South Australia for passing a valueless cheque, and was sentenced to 6 months' imprisonment. In the same year, shortly after his release, he was again convicted of forgery, for which he received a sentence of three years. Held that these amounted to frequent convictions within the meaning of s. 74 (c) of the Marriage Act 1890. *Richards v. Richards*, 133.

—s. 74—Desertion. When a wife leaves her husband against his will,

though his cruelty may have afforded her a good excuse for so doing, *quære* whether this constitutes an act of desertion on the part of the husband. If during a temporary suspension of cohabitation, mutually agreed upon, the respondent has been guilty of unequivocal acts demonstrating that he has taken advantage of it to break off his connubial relations and has deserted his wife, desertion will be deemed to have commenced from the time of the commission of these acts. *Neilson v. Neilson*, 193.

—s. 78—Divorce Rules 1885, r. 6—An order excusing the petitioner from making any person a co-respondent to the petition cannot be obtained until after service of the petition on the respondent. *Harley v. Harley*, 85.

—ss. 87, 96—Alimony—Attachment—The Court has power to grant an attachment against a husband for non-payment of arrears of an annuity included in an order absolute for divorce. Defects in an order not appealed from in a matter in which the Court has jurisdiction cannot be relied on as an answer to a proceeding to enforce an order. *Gilchrist v. Gilchrist*, 155.

—sec. 111.—Nullity of marriage—Sec. 111 of Act No. 1166 does not apply to suits for a declaration of nullity, and therefore a judge has no jurisdiction, in such suits, to make an order that a sum of money be paid into Court to enable the female petitioner or respondent to have the merits of her case investigated by a proctor. *Muir v. Sutherland*, 20.

—sec. 111—A wife has to satisfy the Court that she has not sufficient separate estate to bring herself within the meaning of sec. 111. *Hugo v. Hugo*, 157.

—sec. 111—Applications under sec. 111 of Act No. 1166 can be heard by a Judge in Chambers. *Bennetts v. Bennetts*, 229.

—sec. 111.—In applications under this section the Court has to enquire whether the wife has or has not sufficient separate estate and also what would be a sufficient sum, if she has not such estate, to enable her to have the merits of her case investigated; and therefore an affidavit is required not only that the wife has not sufficient estate but also to show circumstances from which the Court can gather what would be a sufficient sum to enable her to have her case investigated. *Bone v. Bone*, 252.

Married woman,—form of judgment against. *Shepherd v. Penglaue*, 202.

Married Women's Property Act 1890, s. 4 sub-sec. 2.—Action against a married woman. Obligatory judgment against. Form of. Where a purchase is made in the name of a wife or other near relative the presump-

tion that a provision was intended is only a circumstance of evidence, and evidence is admissible to rebut such presumption and to prove what was the intention of the purchaser at the time the purchase money was paid. In actions or contracts against a married woman it is only where damages or costs are recovered that the plaintiff must prove that the married woman had separate property at the time the contract was made. The form of judgment against a married woman under sec. 4 sub-sec. 2 (approved of in *Scott v. Morley* 20 Q. B. D. at p. 132) may be as follows: "It is adjudged that the plaintiff do recover £—and costs (to be taxed) against the defendant (the married woman) such sum and costs to be payable out of the separate property, as herein-after mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of section 22 of the Married Women's Property Act 1890 the property shall be liable to execution notwithstanding such restriction. A married woman could have been sued for the enforcement of a trust before the Married Women's Property Act was passed and as the Act does not limit but extends the liability of married women *a fortiori* she can be sued for such a cause of action now. *Shepherd v. Penglase*, 202.

Medical Act 1890, s. 11.—The use of the term "oculist," coupled with evidence showing an intention to use it as a medical or surgical term or name, is an offence within section 11 of the Medical Act 1890. The term "oculist" is a word of double meaning, and may be a medical or surgical name or title within the meaning of section 11 of the Medical Act 1890, or it may not be such name or title. *Hardie v. Singleton*, 184.

Mining Companies Act 1871, sec. 50—Sale of forfeited shares. The advertisement advertising the time when the call on shares in a company will be payable must be published a reasonable time before the call is payable, and a call which has only to be advertised in Melbourne and is payable in Melbourne, is reasonably advertised if seven days' notice is given. Every share in a company is liable to pay calls, and if shares lying in the hands of a company are, after a call has been made, but before it has become payable, sold to a purchaser, such purchaser is liable for the call when it becomes due. There is no provision in the Companies Act which prevents directors of a company, after an abortive sale of forfeited shares, from ordering and holding a fresh sale. *Moore v. Wheal Byjerkerno Tin Mining Co.*, *No Liability*, 108.

ss. 52, 56. Where a call upon

shares in a no-liability company has been made, and remains unpaid for a period of 14 days from the making thereof such shares become forfeited. When a director of a no-liability company loses his qualification as such director by the forfeiture of his shares in the company, his subsequent redemption of them does not reinstate him as a director. Where the articles of a company do not contain a provision validating the acts of *de facto* directors as opposed to *de jure* directors, all acts done by unqualified directors are invalid. *Haddow v. Duke Coy.*, *No Liability*, 4.

Mining on Private Property Act 1884—Lease—Re-entry—A, the owner in fee simple of certain land, granted a lease of it, for mining purposes, to B for the term of 21 years, dating from the 6th February, 1881. In the year 1884 the Mining on Private Property Act 1884 came into force, and on the 13th July 1885, B obtained under that Act a mining lease for the term of 11 years, giving him a right to mine on A's land. Subsequently these leases were assigned to C. Held, that on a breach by C of the covenants of the lease from A to B, A, notwithstanding the subsisting mining lease from the Crown to B, was entitled to re-enter and dispossess C of the land. *Carroll v. Wooldridge*, 151.

Misrepresentation—See Sale of Land. *Curwen v. Yan Yean Co.*, 147.

Mortgage—Clogging the equity of redemption. A leased certain premises to B for a term of 21 years. B mortgaged that lease to C, and in the indenture of mortgage was a covenant giving C, the mortgagee, an option to purchase. B assigned a lease to D, who took the assignment with full knowledge of the mortgage and the covenant therein contained giving the option to purchase. C, the mortgagee, brought an action against D, the assignee of the lease, to enforce specific performance of the covenant. Held that the action was misconceived and would not lie against the assignee of the lease. A covenant in a mortgage over a lease, giving the mortgagee the option to purchase at a price which shall be the proportionate value of the lease on the day of purchase calculated upon the basis of a fixed sum as the value of the lease on a particular day, prior to such purchase, is not void for uncertainty. A covenant in an indenture of mortgage, giving the mortgagee an option of purchase, cannot be specifically enforced, as it is in direct violation of the rule of law that the equity of redemption cannot be clogged in any way. *Dismorr v. George*, 106.

Mutual mistake—See Contract. *Chamberlain v. Thornton*, 188.

Negligence—Contributory negligence. A passenger travelling by rail put his head out of the window. An

approaching train coming from the opposite direction had one of its carriage doors wide open. This door struck the passenger and killed him. In an action by the administrator of the deceased against the Railways Commissioners for negligently causing the death of the deceased, the defence to which was a denial of negligence and an allegation of contributory negligence, the jury found a verdict for the plaintiff for £200 damages, and judgment for that amount was entered up for the plaintiff. Held on appeal and motion for new trial (*per* Higinbotham, C.J., and Holroyd J.) that the fact of the door of the passing train being open was evidence of negligence on the part of the defendants, and that the act of the deceased in putting his head out of the window though a voluntary act was not an unlawful act, nor was it obviously a dangerous act, and that therefore it would not be affirmed that the evidence went necessarily to show that the negligence of the deceased was the cause of his death, or that the deceased had been guilty of any negligence at all, and that therefore the question of contributory negligence could not have been properly withdrawn from the consideration of the jury and a verdict directed for the defendant, and the appeal was dismissed and the motion for new trial refused. (*Per* Williams, J., *dissentiente*). Assuming that there was evidence of negligence on the part of the defendants in respect to the open door of the passing train, yet if a passenger chooses to do an act outside the carriage, which may be dangerous, he does that act at his own risk unless he has been induced or invited to or is excused from doing that act by reason of some inducement, conduct or default of the defendants. *King v. Victorian Railways Commissioners*, 293.

New Trial—Right of Court to consult the judge who tried the action. Testamentary incapacity. Questions for the jury. On a motion for a new trial on the ground that the verdict of the jury is against evidence and the weight of evidence the court has a right to consult the learned judge who tried the action as to whether he was satisfied with the finding of the jury. On such a motion the question that the Court has to consider is not whether the learned judge who presided at the trial was satisfied with the findings of the jury though serious consideration should be given to his opinion; nor is it for the individual members of the Court to consider whether they themselves would have come to a different conclusion, but it is for the Court to consider whether the verdict was one such as a jury of reasonable men ought not to or could not, upon the evidence adduced at the trial, have arrived at. In an action to set aside a will on the ground of testamentary incapacity the questions that the jury

have to consider are whether at the time the testator made the will in dispute his mind had a sufficient grasp of the nature and extent of his devisable property, of those who might be considered to have claims upon him and of the nature of those claims. *McMeekan v. Aitken*, 199.

Oculist, meaning of—See *Medical Act 1890. Hardie v. Singleton*, 184.
Part Performance.—See *Sale of Land. Guest v. Watson*, 66.

—See *Instruments Act 1890. Kaufman v. Michael*, 279.

Payment into Court.—See *Wrongs Act 1890. Tompsett v. Wilson*, 54.

Police Offences Act 1890.—Who may be informant—Penalty—See *Sargood v. Veale*, 13 A.L.T. 121. *Re Goodison*, 165.

s. 6—Bye-Law—Hawker—Linger or Loiter. A bye-law of the city of Ballarat provided as follows—"Any person offering for sale any commodity in any street of the city shall not linger or loiter in such street nor occupy any fixed stand therein, but shall keep moving along such street on the side thereof situate on his left hand, at a reasonable walking pace of not less than one mile per hour and shall not travel the same road, street, or pathway more than once in the same hour. Held by the majority of the court (Higinbotham, C.J., *dissentiente*) that a hawker remaining for 35 minutes in the same place does not comply with the regulations. *Murphy v. Lee*, 43.

Police Regulation Act 1890, sec. 4—Powers of Governor-in-Council. The Governor-in-Council has power to dismiss or discharge any officer; this includes the legal power to permit or even to compel him, without a certificate of incapacity, to retire from the force. *Green v. The Queen*, 29.

Pounds Act 1890, s. 30 (1). Notice in the Government Gazette, although *prima facie* evidence of the existence of a pound is not the only evidence—The limits of a pound need not be proclaimed—Notice to the owner of impounded cattle is not necessary to make the impounding legal—A pound-keeper's statement unobjected to at the time is sufficient evidence of his appointment. *Ross v. Costello*, 215.

Practice—Rules of Supreme Court 1884 Order III., r. 6—Order XIV., r. 1—Promissory note—Interest—special indorsement—A claim in a writ for interest on a promissory note does not deprive the plaintiff of the benefits of a specially indorsed writ, and therefore the plaintiff can apply for judgment under Order XIV. r. 1. *Humberstone v. Minchin*, 156.

—Order III., r. 6—Order XIV. rr. 1, 2—Specially endorsed writ—Final judgment—Non-service of exhibits—Irregularity—Demand before action

—Where, in an application for final judgment, the exhibits referred to in the plaintiffs' affidavit are not served with the affidavit such non-service is an irregularity only and can be cured by granting an adjournment—Where in a writ purporting to be a specially endorsed writ there is a manifest blunder in the particulars, such blunder not altering the manifest sense of the endorsement. Held that the blunder did not deprive the writ of its character of being a specially endorsed one—In an action by a customer against his banker for payment of an account current no previous demand for payment is necessary before action; the writ being a sufficient demand. *Tunstall Brick and Pottery Coy. v. Mercantile Bank of Australia Limited*, 178.

—Order III., r. 6—Order XIV., r. 1—Specially endorsed writ—Final judgment—Amendment—To entitle a plaintiff to apply for final judgment under Order XIV. r. 1, the writ must be specially endorsed at the time the defendant enters his appearance—After appearance an amendment of the writ will not be allowed for the purpose of enabling the plaintiff to apply for final judgment under Order XIV. r. 1. *Moore v. Russell*, 198.

—Order III., r. 6 (F), Order XIV. r. 1—Specially endorsed writ—Mortgage—Attornment—Landlord and tenant. Where by a mortgage deed, the mortgagor attorned tenant to the mortgagee, and the mortgagee had power of re-entry on default, and default was made. Held, that the mortgagor was a tenant whose term had expired or had been duly determined by notice to quit within the meaning of Order III., r. 6 (F), and that therefore a writ to recover possession of the land could under the circumstances be specially endorsed. *Paterson v. McCarthy*, 217.

—Order III., r. 6—Order XIV., r. 1—Specially endorsed writ—Banker's overdraft—Particulars—Interest—In an action by a banker to recover the amount of an overdraft with interest, the particulars should state when the account commenced, the rate of interest charged, and the manner in which it is calculated, whether on daily balances or otherwise, and whether half-yearly or other rests. Where a claim is made for interest from the date of the writ until judgment, the particulars should show whether the claim is demanded by way of damages or pursuant to a contract. *Federal Bank v. Byrne*, 229.

—Order III., r. 6; Order XIV., r. 1—Specially endorsed writ—Overdrawn account—Interest. In an action by a banker to recover the amount of an overdraft, with interest, the endorsement should show how the claim for interest arises, whether by contract or otherwise, and how the rate of interest is arrived at. *New*

Oriental Banking Corporation v. Pelt, 230.

—Order III., r. 6—Order XIV., r. 1—Order XIX., rr. 4, 11—Specially endorsed writ—Interest—Signature by firm—Delivery. Where a guarantee provides for payment of the "usual rate of interest," the holder of the guarantee may specially endorse his writ for the principal sum and interest at the usual rate. A specially endorsed writ need not have the word "*delivered*," nor the date of delivery endorsed on it. A specially endorsed writ may be signed in the name of a firm of solicitors. *Bank of Victoria v. Perrin*, 231.

—Order IV., r. 1; Order XIX., r. 4—Specially endorsed writ—signature—Agent—Order IV., r. 1, treats the agent of the solicitor as the solicitor of the client, and therefore the agent is the person under Order XIX., r. 4, who is meant by "the solicitor," and he and not his principal must sign the endorsement to a specially endorsed writ. *Harvey v. Stout*, 286.

—Order XII., r. 8—Order XIV., r. 1—Final judgment—Appearance—In an application under Order XIV. for final judgment the production of the duplicate memorandum of appearance, sealed with the seal of the Court, is sufficient evidence of the fact of appearance. *Bank of Van Diemen's Land v. Ivey*, 180; *Doughty v. Counsel*, 180.

—Order XIV., r. 1—Order LIV., r. 4*—Notwithstanding order LIV. r. 4* the time for delivering a defence does not run between the time for taking out and the hearing of a summons for final judgment under order XIV. *Sutton v. Sautter*, 36.

—Order XIV., r. 1—Vacation—In vacation a judge has no power to entertain an application for final judgment under order XIV. r. 1. *Gill v. Metropolitan Bank*, 157.

—Order XIV., r. 1—Final judgment—Affidavit in reply—In applications for final judgment under order XIV. r. 1, a judge ought not to look at an affidavit in reply to the defendants answering affidavit. *Richelieu v. Brookes*, 173.

—Order XIV., r. 2—Order LXX., r. 1. Where in an application for final judgment it appeared that the two clear days had not elapsed between the service of the affidavit in support and the return day of the summons as required by order XIV. r. 2. Held that this was an irregularity only and did not render the proceedings void and an adjournment was granted to give the defendant the required time. *Roberts v. British Bank*, 29.

—Order XVI., r. 22. Where a plaintiff sues *in forma pauperis*, costs incurred in the action prior to the order permitting him to sue in such form, may be given against him. *Stanley v. Moore*, 2.

Practice—Order XVI, r. 48—Third party—Application—An application by the defendant for leave to bring in a third party ought to be made on notice to the plaintiff, and not *ex parte*. *Union Trustee Inc. Coy. v. White*, 180.

—Order XX, r. 4—Material facts—Pleading—Where a party intends to rely on previous dealings between the parties to add an implied term to a written contract he must set it out in his pleadings. *Upton v. Chipman*, 239.

—Order XIX, r. 15. A general demurrer is bad pleading—The point of law relied on must be specifically stated. *Sweetnam v. Jacobs*, 169.

—Order XIX, r. 27—Striking out—Slander—Pleading two defences in same paragraph of defence—Where, in a plea to an action for slander, the first part of the paragraph disclosed a defence of privilege and the latter part, if sustainable, would have been a defence of justification. Held, that the plea, as it stood, was embarrassing and the latter part was ordered to be struck out. *Lawlor v. Crisp*, 52.

—Order XXII, r. 1—Order XXXVI, r. 37—Slander payment into Court—Denial of Liability—*Innuendo*—Particulars of evidence in mitigation of damages—Where in an action of slander the alleged *innuendo* places a meaning on the words other than their natural meaning, the defendant may admit the slander and pay money into Court and may deny the *innuendo*—Particulars under Order XXXVI, r. 37 are not part of the pleadings and should not be filed as such. *Caldwell v. Dma'dson* 154.

—Order XXVIII, r. 6—Pleading—Amendment—Affidavit—Unless the Court is satisfied that the party applying is acting *bona fide*, or that by his blunder he has done some injury to the other party, which cannot be compensated by costs or otherwise, an application to amend a pleading may be granted at any stage of the proceeding—Where an application to amend a pleading is made at a late stage in the proceedings an affidavit explaining the delay is not necessary. *Sweetnam v. Jacobs*, 50.

—Order XXXI, r. 1—Administration and Probate Act 1890 (No. 1060) ss. 40, 41—Attorney under power—Caveat—Order nisi—Interrogatories—Where, in an application under sec. 40 of Act No. 1060, by the attorney under power of an executor a caveat has been lodged and an order nisi granted, the original executor is not a party to the proceedings, and therefore cannot be interrogated. *In Will of Bishop*, 51.

—Order XXXI, r. 11—Interrogatories—Further answers—Servants or agents—The party interrogating can only require the interrogated party to make inquiries from his servants or agents as to what his servants or

agents know, or did in the ordinary course of their employment. *McMeekin v. Aitken*, 33.

—Order XXXI, r. 11—Interrogatories—The party interrogating is entitled to have a distinct statement on the face of the answer that the party interrogated has made inquiries from his servants or agents, and that after such inquiries he is unable to answer as to his knowledge, information, or belief. *The City Newspaper Company Limited and another v. The Evening Standard Newspaper Company Limited and others*, 37.

—Order XXXI, r. 11—Interrogatories—Further answers—Libel—In an action for libel, a defendant may object to answer an interrogatory as to whether he published the alleged libel, on the ground that the answer might tend to criminate him. When an objection is taken to answer an interrogatory on the ground that it may tend to criminate the person interrogated, the judge must decide whether in his opinion the question may have such a tendency. *Anderson v. Douglas*, 171.

—Order XXXVI, rr. 39, 42—Order XLII, r. 2; Order XLII, r. 5. Where, in an action against two defendants, judgment is given for one defendant and against the other defendant, the successful defendant is entitled to take out judgment on his own behalf without incorporating therein the judgment given against the other defendant. There need not necessarily be only one judgment in an action. *Sheppard v. Penglase*, 70.

—Order XLV, r. 1—Attachment of debts—Garnishee. A garnishee order does not make the garnishee a debtor of the garnishor and therefore, where a garnishee order was still unsatisfied, the garnishor cannot attach debts due to the garnishee. *McKenzie v. Walker*, 19.

—Order XLV, r. 1—Appendix B. No. 25—Garnishee—Affidavit—The affidavit in support of a garnishee order *nisi* must state that the garnishee "is within the jurisdiction of the Court"—An affidavit describing the garnishee as of a place within the jurisdiction is insufficient. *Adcock v. Adcock*, 23.

—Order LIV, r. 24—Notice of motion under this rule must be served within five days of the order appealed from, and the motion must be made within eight days of the order appealed from. *Cahill v. Cahill*, 209.

—Order LV, rr. 69 and 70—On a summons to vary a certificate of the chief clerk the costs will usually follow the event. *Despriss v. Milbourne Mackay Sugar Company*, 212.

—Order LVII, r. 7—Order LXV, r. 27(41)—Interpleader issue—Costs—Review of taxation—Where an order directing an interpleader issue provides that the costs of both the plain-

tiffs and the defendants in the issue should abide the event. Held that the costs of the proceedings should go as in an action between the parties. *McVitty v. Crowley*, 103.

—Order LXV, r. 14—Set-off—Solicitor's lien. Order LXV, r. 14, only applies to proceedings in any particular cause or matter. *Ailgariff v. Driscoll*, 50.

—Order LXVII, r. 9—Real Property Act 1890 (No. 1136) ss. 125, 180—*Fi fa*.—Execution—Land. A sheriff cannot seize and sell property out of the jurisdiction of the Court. *Herick v. United Claude S. M. Coy.*, 252.

—Supreme Court Act 1890 (No. 1142) sec. 85—Foreign procedure—Wilful neglect to appear—A Judge has to be satisfied not merely that the defendant neglects to appear, but also that his neglect is wilful. Proof of service of the writ upon the defendant and of his non-appearance, coupled with a statement on oath by a deponent of his belief that the defendant wilfully neglects to appear without any other facts being disclosed from which an inference can be drawn one way or the other, is not sufficient to satisfy the Judge that the defendant has wilfully neglected to appear to the writ. *Quinn v. Macartney*, 169.

—(Probate)—Administration—Dispensing with sureties. A. applied for a grant of letters of administration dispensing with the sureties, and supported her application by an affidavit by herself stating that there were no debts, and that she and the only next-of-kin (a son of the deceased) had agreed on a division of the estate, and by an affidavit by the son giving his consent to the grant without such sureties. Held that the son might be accepted as the only surety, and that he need not be required to justify. *In re Ellis*, 95.

—(Probate).—Administration—The Court will not grant administration of an estate during the minority of an infant to persons not entitled, though they be near relatives of the infant, unless it be shown that it would be for the clear benefit of the infant that the grant should go. *In re Munroe*, 110.

—(Probate)—Application for administration *c.t.a.*, of the unadministered estate of a testator by a Company authorised so to apply by the executors of the testator's surviving executor, there being children of the executor who are sole beneficiaries under the will, and the eldest of whom is nearly of age, refused. *In will of McCarty*, 212.

—(Probate)—Administration—Caveat—Costs—Where an executor advertised his intention to apply for probate but on a caveat being lodged took no further steps in the matter,

on notice to him, administration was granted to the caveatrix until the will was brought in and proved. Costs were not given against the executor as no express notice was given that such an application would be made. *In re Williams*, 284.

Practice—(Probate)—Will—Executors residing out of the jurisdiction—Bond—Powers of Court of Probate—Section 20 of the Supreme Court Act 1890, impliedly empowers the Court of Probate to require security to be given in any case, or class of cases in which the rendering of accounts by an executor could not readily be enforced unless security were given, or, in which, for any other reason it should seem to the Court, that such an order would be reasonable and necessary. *Re Knight*, 86.

(Probate)—Will—The Court will order a foreign probate to be sealed with the seal of the Court though the only property of which the testator died possessed in this colony was trust property. *In will of Blackwood*, 94.

(Probate)—Will and Codicil—Ambiguity—Admission of parol evidence. A testator by his will appointed his wife and a Mr. Lambie executors of his will, subsequently the testator made what was entirely a new will but which purported to be only a codicil to the will appointing his wife and one of his sons as executors. On application for probate to the widow and son held that the codicil did not revoke the will and that parol evidence to shew that it was the testator's intention to revoke the will was inadmissible and though there were no trusts under the will which Mr. Lambie would be able to perform probate was granted to the widow and the son leave being reserved to Mr. Lambie to come in and prove. *In will of Butcher*, 166.

(Probate)—Will—Revocation by tearing—Wills Act 1890 s. 18. A very slight tearing across a substantial and important part of a will where there is evidence of an intention to revoke will amount to a revocation of a will. If a will is revoked, the Court, though all persons interested in the event of an intestacy consent, will not grant probate. *In will of Barker*, 167.

(Probate)—Will—When the testator's wife is appointed executrix, with a provision in the will that in the event of her marrying again the testator's son to take her place as regards the will, probate will be granted to the wife, reserving leave to the son, on her marrying, to apply for probate. *In will of Hogan*, 212.

(Probate)—Will—Where a duplicate will is submitted for probate there must be an affidavit by some person who knows that the document is a duplicate. Where

there are unimportant alterations in a will, some initialled, and others not, and all appear to have been made at the same time, the Court will grant probate with both classes of alterations. The Court will itself examine the will and determine when the alterations were made. In an affidavit in support, the place of business of a solicitor is a sufficient description of his residence, but not that of a solicitor's clerk. The full name and residence of attesting witness must be supplied when possible. *In will of Perry*, 213.

(Probate)—Administration—Where administration had been granted to intestate's father who had died before swearing the administration bond; on an application for administration by the intestate's brother the Court required to know whether the father had left a will, and if so, what was its effect. *In re Day*, 215.

(Probate)—Executor's commission—Where executors have passed their accounts the Court directed the Chief Clerk to allow commission and to fix the amount. *In will of McCallum*, 215.

(Probate)—Administration—Where a testator gave all his property to his wife for life, and appointed his sons to be executors after his wife's death, administration *c.t.a.*, was granted to the widow, reserving leave to the sons to come in and prove the will after her death. *In will of Irvine*, 240.

(Probate)—Will—The Court will not extend the time within which application for probate must be made, viz., six months from the publication of notice of intention so to apply, without an affidavit explaining the delay. *In will of Mercer*, 241.

(Probate)—Where the testator executed four testamentary documents, A, B, C, and D, of which A was a will and B and C codicils to it, and D another will executed before C, the codicil C revived the will A, and probate would be granted to the will A and the codicils B and C. *In Will of Crawford*, 241.

(Probate)—Will—Legal estate—Trusts. A by his will left his real estate to the use of trustees in trust for B during his life and subject thereto to the use of the person or persons who at B's death would be entitled thereto by descent in case she had died seized thereof in fee simple by purchase and intestate. B having died an action was brought for a declaration of the trusts of the will and for all necessary directions and enquiries. Held that as there were no trusts to be declared the Court could not entertain the action. *Gemmell v. Gemmell*, 281.

(Probate)—Practice administration—Act No. 978, ss. 10, 11—Appointment of company in place of ad-

ministrator—Form of order—Costs. *In re Leahy*, 299.

Principal and Agent—Breach of warranty of authority—Distinct allegation of such authority. In an action for breach of warranty of authority to make a contract, a distinct allegation of such want of authority is material and necessary. *Brown v. Robertson*, 11.

Privilege—See Libel. *McCormick v. Cuthbert*, 137.

Prize-money—See Lottery. *Florange v. Hutchinson*, 15.

Promoter—See Sale of Land. *Curwen v. Van Yean Co.*, 147.

Public Service Act 1890, (No. 1133) s. 2—Civil Service Act of 1862—Public Service Act 1883, (No. 773), s. 2. The system of promotion provided for under the Public Service Act 1883, applies to all classified officers in the Public Service including officers classified under Act No. 160. Section 2 of the Public Service Act 1883 does not preserve a right of prior promotion to officers classified under Act No. 160, as against officers classified under the Public Service Act 1883. A saving clause in an Act of Parliament which is repugnant to the body of the Act is void. (*Brown v. The Queen*, 12 V. L. R., 327, distinguished.) (*Per Hood, J.*)—The result of section 21 of Act No. 160, was to tie the hands of the Governor-in-Council and so limit the choice for promotion in cases of vacancies to the members of a particular class, and the utmost section 2 of the Public Service Act 1883 does is to tie the hands of the Governor-in-Council as they were tied before by limiting him in filling vacancies in the fourth class to a choice from the members of the fifth class who are legally there at the time of the promotion. *Owen v. Kendall*, 217.

ss. 2, 6, 121, 123, 124, 129—A public servant appointed under Act No. 160, may be dismissed by the Public Service Board, as constituted by the Public Service Act 1890—section 2 of this Act does not preserve rights previously acquired, but which have not become operative, and therefore the words "any officer" in section 124 signify any officer whenever and however appointed. *Byrchall v. The Queen*, 232.

Purchase, option of—See Mortgage. *Dismorr v. George*, 106.

Railways Act 1890, s. 119—Cause of action in respect of which Railways Commissioners are entitled to notice. Time for giving notice. An action arising out of the negligent management of railway gates, is an action in respect of which the Commissioners are entitled to notice. The words "suing out," in section 119 of the Railways Act 1890, mean the issue or delivery of the writ to the

person obtaining it. Notice of action must be served on the Commissioners within five months from the day on which the cause of action arose. *O'Brien v. Victorian Railways Commissioners*, 263.

Real Property Act 1890, (No. 1136) sec. 19—Statute of Limitations—The entry of an administrator on land of his intestate prevents the Statute of Limitations beginning to run against the infant heir. The mere fact that the infant did not take possession, and that the land was unoccupied during her lifetime makes no difference. *Gregory v. Poole*, 234.

ss. 19, 31 and 32. A brought an action for the recovery of land from B. The land was conveyed to A on November the 24th, 1860. The writ in the action was issued in March 1891. A has always lived beyond the seas and never went into possession or exercised any act of ownership over the land. B went into adverse possession of the land in 1874. Held under ss. 19, 31 and 32 of the Real Property Act, 1890, that A's title to his land was extinguished after 30 years from the date of his conveyance, and that his action was too late. Held also that B was entitled to the land. *Warner v. Hann*, 59.

sec. 23—The words in this section "shall be deemed to have determined" mean "conclusively determined." Where a person is put into the possession of land to protect the interests of an infant, a constructive trust is created, and even though the occupation be beneficial to himself and not to the infant, the Statute of Limitations will not run against the infant during his infancy. *Wiley v. Egan*, 57.

Rectification of Contract

See Contract. *Chamberlain v. Thornton*, 188.

Re-entry—See Mining on Private Property Act 1884. *Carroll v. Woodbridge*, 151.

Registration of Births Deaths and Marriages Act 1890, second schedule—Perjury—Registration of illegitimate child. The particulars required to be known and registered under the second schedule of the registration of Births Deaths and Marriages Act 1890 are particulars with respect to the child whose birth is being registered and whether or not the father is married to the mother of such child and a conviction of the father for perjury will be sustained if he made a false statement with respect to the above particulars though such statement apart from such particulars was true in fact or was not proved to be false. *Reg. v. Surbery*, 183.

Representative capacity—Justices have no jurisdiction in suits by or against persons suing or sued in a representative capacity. *Reid and another v. Lucas*, 2.

Reputed ownership—See Insolvency Act 1890. *Mantrice v. Hirsch*, 165.

Sale of land—Alterations in contract—Waiver. Where a vendor without the knowledge and consent of the purchaser makes material alterations in the contract after the purchaser has signed it the vendor is precluded from suing the purchaser on the contract. A contracted to sell to B under a contract containing *inter alia* a condition that in the event of any default in the payment of the purchase-money the vendor should be at liberty without notice to rescind the contract and re-sell the property, and sue for the difference in price between the first and second sale, or that the vendor might retain such deficiency out of the amount of any of the promissory notes given which should then have been paid repaying unto the defaulter after the re-sale the residue of such amount, and returning without any unnecessary delay any then unpaid promissory notes. Subsequently B assigned his rights under the contract to C, who gave his promissory notes for the balance of the purchase-money to A. These notes not being paid at maturity A rescinded the contract and re-sold the land. Held that A could sue C on his promissory notes and was entitled to recover from him the difference between the prices of the land at the first and at the second sale. *Obiter dicta*—Where A contracts to sell land to B, and B subsequently assigns his rights under the contract to C, after which A takes C's and not B's promissory notes for the balance of the purchase-money due under the contract, and generally treats C and not B as the purchaser. A may by such conduct without express release waive his rights against B. *Shaw v. Brodie*, 12.

Defective title—Compensation.

A, as trustee under the will of B, sold a piece of land, part of the estate, to C. The contract of sale contained a condition that all requisitions on title were to be made within 14 days from the date of the sale, otherwise all objections to the title were to be deemed waived. A, produced the documents of title in his possession, which showed in him a clear title to the whole of the land. C, being satisfied, paid the whole of the purchase-money, taking a receipt for the same, but he did not take a conveyance of the land. Subsequently, it was discovered that part of the land had been conveyed away by B during his lifetime, and that such deed of conveyance had been registered. Held that C was entitled to recover from A compensation to the value of the land to which A was unable to give title. Where a vendor is desirous to limit the liability under which he usually rests, of making good title to land which he is selling, he must do so in terms ex-

PLICIT, plain, and unambiguous. Where a partial failure of title is discovered before conveyance, the Court may inquire into all the circumstances, and may award compensation to the purchaser according to the real state of the case. *Roberts v. Balfour*, 63.

—Specific performance. A plaintiff cannot bring an action for the specific performance of a written agreement with a parol variation. Where a plaintiff brings an action for the specific performance of a written agreement with a parol variation, and sets up a part performance in order to take the case out of the Statute, that part performance, in order to entitle him to succeed, must be referable only to the parol variation, and must be a part performance by himself and not by the defendant. *Gruet v. Watson*, 66.

—Vendor and purchaser—Specific performance—Description. Land described in a contract of sale as at the corner of two streets, naming them, is a sufficient description within the Statute of Frauds. *McDowell v. Meader*, 116.

—Promoter—Fraudulent misrepresentation—Concealment of vendor—Form of relief. Lyon, a promoter of a company intended to be formed, induced the plaintiff to take a promoter's share therein by fraudulent misrepresentation. The company was subsequently formed and a number of shares were allotted to the plaintiff in respect of the money paid by him; afterwards the plaintiff was required to pay calls on the said shares. In an action by the plaintiff against Lyon and the company, Lyon was ordered to give an indemnity to the plaintiff in respect of the shares which he was fraudulently induced to take, and it was further ordered that the said shares should be transferred to Lyon, and that the money originally paid by the plaintiff should be repaid to him by Lyon. (See *Ballintyne v. Raphael*, 15 V.L.R., 538; *MacVean v. Woodcott*, 11 A.L.J., 74.) *Curwen v. Yan Yean Co.*, 147.

—No title as to part. Compensation. If a person sells property, representing it to be his own, he contracts impliedly if not expressly that it is his own and is answerable on his contract to the purchaser if it turns out that the property is not his own. An express stipulation by a vendor that he shall not be liable to make title will take him out of the operation of the above rule. The different provisions of the contract must be considered as a whole in determining whether the vendor has so expressly stipulated. A claim for compensation for defective title involves the consideration and its allowance or rejection depends upon the true construction of the contract into which the parties have entered. A purchaser of land by taking from the vendor a

receipt for the purchase money in order to enable him to bring the land under the Transfer of Land Act does not give up his right to demand a conveyance from the vendor in the event of his being unable to obtain a title under that Act. *Roberts v. Balfour*, 181.

Shares—Issued at a discount. See Companies Act 1890. *In re Str et and Coy.*, 35.

—Breach of contract to deliver. See Contract. *Vickery v. Foley*, 68.

—Sale of Forfeited. See Companies Act 1890. *Moore v. Wheel Byjerkern Tm Mining Coy.*, 108.

—Paid up. See Company. *Re Street and Coy.*, 126.

Shareholder, action by. See Company. *Stanley v. Moore*, 2.

Specific performance—See Sale of Land. *Gurst v. Watson*, 66.

—See Mortgage. *Dismorr v. George*, 106.

—See Instruments Act 1890. *Kaufman v. Michael*, 279.

Stamps Act 1890, ss. 68, 76, 77, 87—Promissory note. Proper person and proper time to affix and cancel the stamp. The proper person to affix and cancel the stamp on a promissory note is the maker, and the proper time to affix and cancel such stamp is when the note is made and before it is issued and this is so even though the promissory note be post-dated. The words "duly cancelled" in s. 87, sub-sec. 4 of the Stamps Act 1890 mean a defacement that will make it impossible that the stamp shall be used by any other person, at any other time or for any other instrument. Where a promissory note comes into the hands of a holder at a date prior to the date appearing on the stamp such stamp cannot purport or appear to be duly cancelled within the meaning of s. 87 sub-sec 4, and even though such holder be a *bona fide* holder he cannot recover on the note in an action against the maker. A *bona fide* holder of a promissory note not duly stamped is only protected, if when he receives the note the stamp upon it is sufficient in amount and on the stamp appear a name or initials which may be those of the proper person and a date the proper date. *Australian Mortgage etc. Coy. v. Guthridge*, 129.

—ss. 70, 71, 93, 97—Re-transfer—Stamp duty—A retransfer by a purchaser to a vendor on the failure of the purchaser to complete his purchase is not liable to stamp duty. *Ex parte Miller and Gray*, 169.

—ss. 77, 87, sub-sec 4—Companies Act 1890 s. 48.—Cancellation of P.N. by company. — *Bona fide* holder. Plaintiff was the holder of a promissory note made by three directors of

the defendant company for and on behalf of the defendant company. The learned judge who tried the case, had found that the stamp had been affixed to the promissory note previously to all the signatures being attached to it. He also found that the stamp itself had been cancelled, subsequently to all the signatures being attached to the promissory note. The cancellation had been effected by the name of the defendant company being written across the stamp, together with the date 1st Sep. 1888. Held that the promissory note should be deemed to be duly stamped within the meaning of s. 87, sub-sec. 4 of the Stamps Act, 1890, as regards the plaintiff, who was a *bona fide* holder. Held also, that, assuming the true date of cancellation was not the 1st Sep. 1888, still, inasmuch as the stamp itself had been affixed previously to the execution of the promissory note by the defendant company, the plaintiff was further protected by section 77. A promissory note made by three directors of a company by and on behalf of the company is not executed by the company until all the signatures of the three directors are attached to the promissory note. *Bank of South Australia v. City of Adelaide*, 175.

—ss. 93, 94—Lease—Option to purchase—Transfer. A lease containing an option to purchase is not a "transfer" within the meaning of s. 94 of the Stamps Act, 1890. *Re Macaulay*, 114.

Supreme Court Act 1890, s. 3, Order XXVIII., r. 12. A petition may be amended after the order is drawn up. *In re Spence*, 212.

—sec. 149. An application under this section to remit the matter to the arbitrator for reconsideration must be made within a reasonable time. *Shirriffs v. Johnston*, 1.

—1891 s. 5 does not apply to orders nisi to review orders of Justices not in Petty or General Sessions, which are therefore still returnable before the Full Court. *Shire of Caulfield v. Evans*, 216.

Tenant at will—See Landlord and Tenant. *Foley v. Egan*, 57.

Testamentary capacity—In an action to set aside a will on the ground of testamentary incapacity the questions the jury have to consider are whether at the time the testator made the will in dispute his mind had a sufficient grasp of the nature and extent of his devisable property, of those who might be considered to have claims upon him, and of the nature of those claims. *McMeekan v. Aitken*, 199.

Title, defective. See Sale of Land. *Roberts v. Balfour*, 63.

Township, meaning of. *Reg. v. Bell*, 190.

Trade name—Infringement of—

Fraud. It is no answer to an application to restrain by injunction the repetition of acts tantamount to an infringement of a trade name that the defendant did not know that he was doing them he was appropriating or using a name which was the plaintiff's property. The ground of jurisdiction in cases of this kind is the protection of the plaintiff's property, not the fraud of the defendants. *Curtis & Harvey v. Messmer*, 127.

Trade mark—Infringement—Fraudulent imitation. A device containing a large number of elements which are common to the trade, and so *publiri juris* may, if it also contain certain distinctive elements peculiar to itself, be registered as a trade mark. A person using only such parts of such device as are common to the trade will not be liable to an action for infringement of trade mark, but if he use them in such a manner as to show a clear intention to profit by the reputation of the article bearing such device, and if in fact such use is calculated to mislead purchasers, he will be liable for fraudulent imitation of such device, and may be restrained from using such parts of such device. *Mitchell v. Joshua*, 131.

Trade Marks Act 1890 s. 13—A corporation can be convicted of offences mentioned in this section—Goods manufactured to a customer's order, but neither delivered nor approved, are "for sale" within the meaning of section 13, sub-sec. (2). An authority to prosecute, which covers the offence set out in the information, is sufficient, though it does not exactly correspond with the information. *Re Christie v. Foster Brewing Coy.*, 235.

Transfer of Land Act 1890, s. 145. An application by a registered proprietor for the removal of a caveat on the ground that it interfered with some future intended dealings with the land will not be entertained by the Court when it is admitted or shown that the caveat has been lodged in accordance with the Act and by a person entitled to lodge it. In such a case the registered proprietor, in order to obtain the removal of, or in order to test the right of the caveator to lodge the caveat, must proceed in accordance with the provisions of section 145 of the Transfer of Land Act 1890. *In re Talbot and Kelly*, 270.

Trust, constructive. See Real Property Act 1890. *Foley v. Egan*, 57.

Trustee—Lunatic trustee—A petition to vest estate of lunatic trustee in other trustees need not be served on the lunatic. *In re Murphy*, 211.

Trusts Act 1890 (No. 1150) sec. 39—New Trustee—A surviving trustee has a discretion to exercise in the appointment of new trustees and this discretion must be exer-

cised without being controlled by any other person. Where a surviving trustee and the administratrix of a deceased trustee join in the appointment of new trustees such appointment is invalid. *In re Dimond*, 18.

Ultra vires—See Company. *Nankivell v. Benjamin*, 282.

Variation, parol—See Sale of Land. *Guest v. Watson*, 66.

Vendor and Purchaser—See Sale of Land.

Vendor, concealed—See Sale of land. *Curwen v. Van Yvan Coy.*, 147.

Voluntary Liquidation Act 1891 (No. 1220) ss. 3, 4—Company—Judgment—Voluntary liquidation—Stay of execution. It is the duty of the Court to see that the creditors of a Company in liquidation share equally, and one creditor will not be allowed to seize the assets and obtain an advantage over the others, except under very exceptional circumstances. Act No. 1220 was passed with a view of protecting companies and of preventing a creditor, in most cases, from pushing his judgment to the bitter end, and of saving companies from being rushed into compulsory liquidation. *Gray v. Australian Deposit and Mortgage Bank Limited*, 230.

—sec. 4—Company—Winding up—Creditors. Before a registered Company can be wound up, a resolution to that effect must be passed not only by a majority in number of the creditors present personally or by proxy, or attorney at a meeting of creditors, but also by creditors to whom is owing at least one half of the amount of the debts of the Company. *In re The Phillip Island Land Co.*, 269.

Waiver—See Sale of Land. *Shaw v. Brodie*, 12.

Warranty of authority—See Principal and Agent. *Brown v. Robertson*, 11.

Water Conservation Act 1887, ss. 100 & 101 reproduced in the Water Act 1890, ss. 103 & 104. The effect of these two sections is that a rate shall not be made until after notice has been given that water has been supplied to the district or part of the district to which the rate is applicable, but after notice has been given a rate may be made by regulation and when so made shall have the

force of law which will prevent any questions being raised as to any act done precedent to the making of the rate, excepting the question that no notice has been given. It is always open to the parties as held in *Sherparton Water Trust v. Jeffrey*, 16 V.L.R., 42, to show that notice has not been given. In an action by a Water Trust or their successors in title for rates, if it be proved that proper notice under section 100 of the Water Conservation Act 1887, and 103 of the Water Act 1890 has been given, it is not open to the defendant to show that the notice is not true or that it is for any other reason open to objection. There is no power given by the Water Conservation Act 1887 such as is given by the Local Government Act to dispute the validity of a rate as a whole by proceedings to quash. A notice under section 100 of the Water Conservation Act 1887 may be given so as to have a retrospective effect, and when given is conclusive evidence of its contents and a rate in pursuance of such notice may be made retrospectively. *Irwin v. Land Coy. of Australia*, 206.

Water Act 1890, ss. 338, 339—Supreme Court Act 1891, s. 5. Where the affidavit in support of an order nisi stated that the cause was heard before two justices in Petty Sessions, although the Water Act makes rates recoverable before two justices simply, a judge has jurisdiction to entertain a motion to make that order absolute. Municipal rate books are under ss. 338 and 339 of the Water Act 1890, evidence of the valuation therein contained. A regulation published in the *Government Gazette*, which specified no date for the payment of the rate is insufficient proof of that rate being due. *Carroll v. Forrest*, 238.

—ss. 483, 525. A local governing body may under s. 483 of the Water Act 1890 sue in its own name for the recovery of water rates and whatever may be the effect of section 525 of the Act it leaves the power given by section 483 unrestricted. *Borough of Hamilton v. King Sun*, 211.

Wrongs Act 1890, s. 5—Libel. Payment into Court of a sufficient sum by way of amends, forms a fourth and an essential element of the defence under section 5 of the Wrongs Act 1890. *Tompitt v. Wilson*, 54.

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Appeal—Application for leave to appeal to Privy Council—Charter of Justice. *Commercial Bank v. Jones*, 112.

Contract—Non-return of shares—Measure of damages—When there has been a breach of contract for non-return of shares and the price of such shares has been forced up by plaintiff, the plaintiff is not entitled by way of damages to the market value of the shares at the time of the breach, but only to what the jury may consider to be their fair value. *Miles v. Lamb*, 135.

Damages—Reduction of damages. Action for not transferring certain shares—Measure of damages. *Sheely v. Russell*, 113.

Deceased Persons Estates Act 38 Vic. No. 1 and the Amendment Act 49 Vic. No. 20. *In re Brodrick*, 299.

Electoral Act 1890 (54 Vic. No. 13)—As to validity of Roll used at Election. As to necessity of electors signing electoral roll before receiving ballot papers under sec. 103 of Act. *Johnson v. Bennett*, 48.

—(54 Vic., No. 13) part IV.—Bribery—Corrupt Practices—Bets—As to validity of Writ for election of Members. *Mugliston v. Dillon*, 44.

Guarantee—Release by deed of principal debtor—As to liability of guarantor. *Commercial Bank v. Jones*, 111.

Interpleader—Bricks made by license of owner of property subject to a mortgage liable to seizure by sheriff. *Mugliston v. Dillon*, 134.

Leases of mineral sections—The court has no power to restrain the Minister of Lands from issuing leases of mineral sections. There is no original jurisdiction in the Supreme Court to hear objections to applications for leases, but application should be made to Commissioner. The Mining Appeals Regulation Act (46 Vic. No. 20) gives right of appeal from his decision. *Omant v. Stephen*, 195.

Mines—Natural lateral support—Blocking out. *Brisson T. M. Co. v. Brothers' Home T. M. Co.*, 196.

Mining appeal—Mining Regulations 13 and 23. *Rayner v. Curtain*, 134.

